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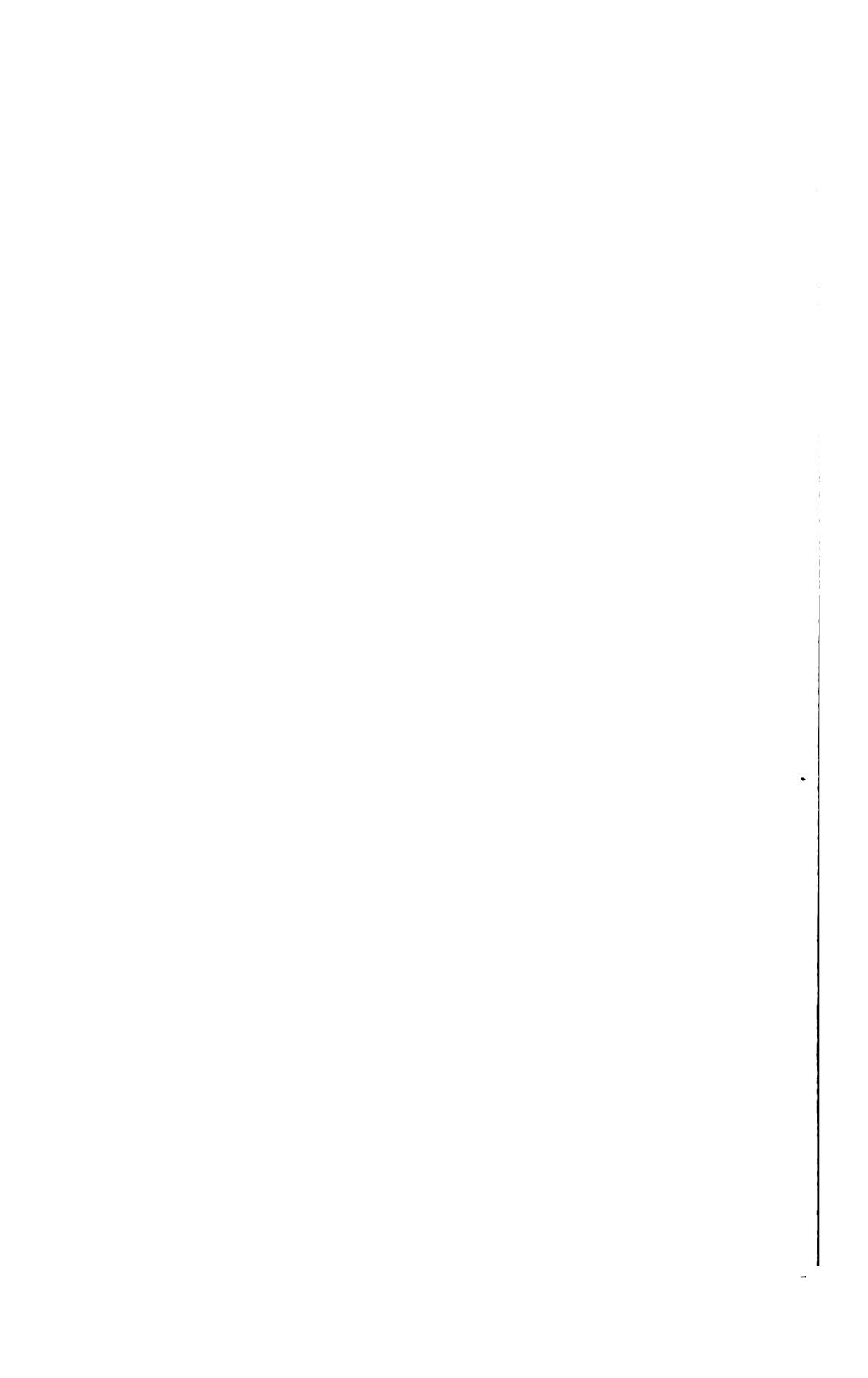
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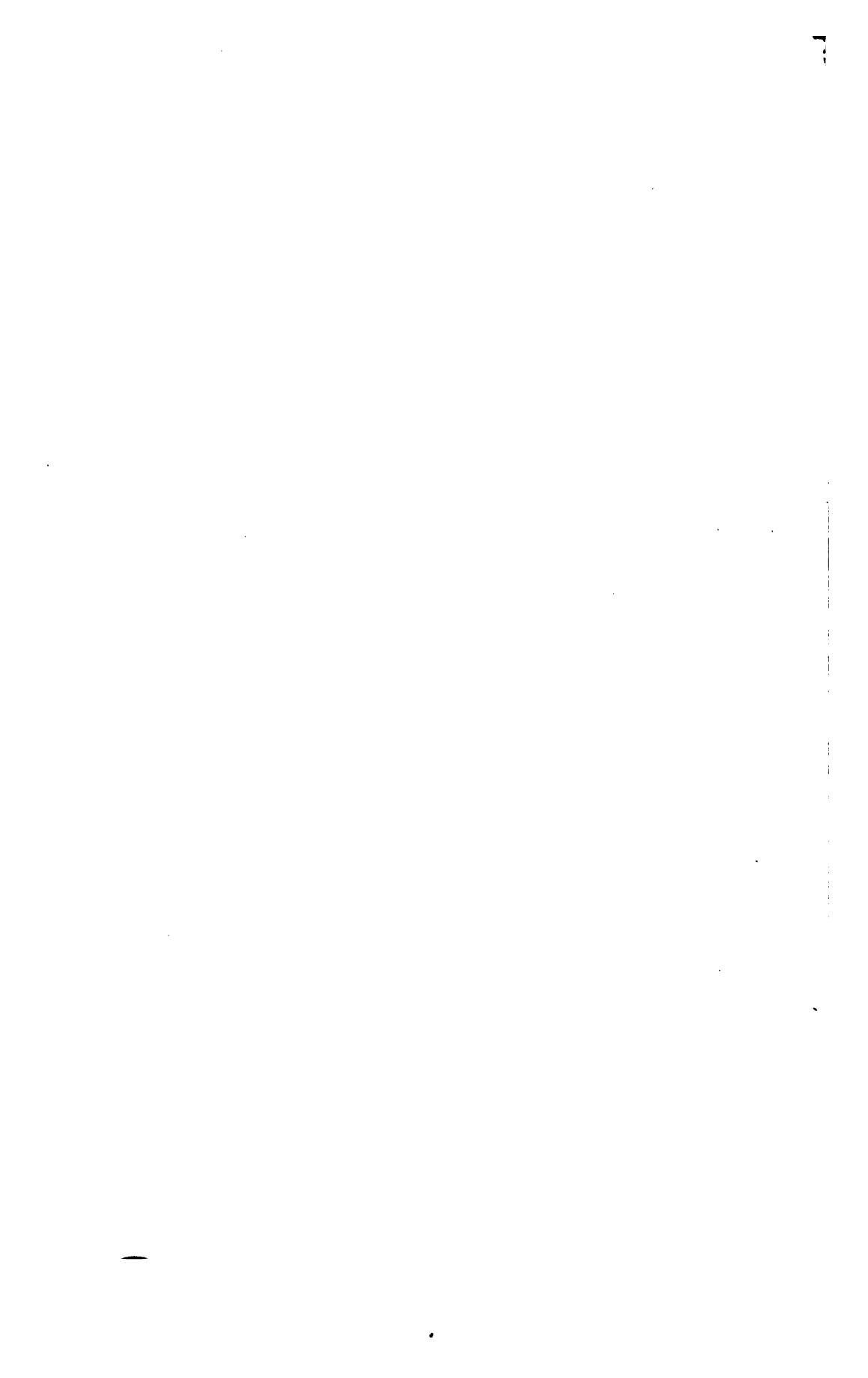
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# **AMERICAN NEGIGENCE CASES**

[CITED AM. NEG. CAS.]

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A COMPLETE COLLECTION OF ALL REPORTED NEGLIGENCE CASES  
DECIDED IN THE UNITED STATES SUPREME COURT, THE UNITED  
STATES CIRCUIT COURT OF APPEALS, ALL THE UNITED  
STATES CIRCUIT AND DISTRICT COURTS, AND THE  
COURTS OF LAST RESORT OF ALL THE STATES  
AND TERRITORIES, FROM THE EARLIEST  
TIMES, WITH SELECTIONS FROM  
THE INTERMEDIATE COURTS.

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**TOPICALLY ARRANGED**  
WITH  
**NOTES OF ENGLISH CASES AND ANNOTATIONS**

PREPARED AND EDITED  
BY  
**WALTER J. EAGLE**

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**VOL. XIV**

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## PREFACE.

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The plan of treatment of the topic of **MASTER AND SERVANT** in the series of **AMERICAN NEGLIGENCE CASES** is fully set out in the Preface to Vol. 13 **AM. NEG. CAS.**, and repetition of the same is unnecessary herein (Vol. 14).

Each State covered in this volume is, so far as the subject treated herein is concerned, complete. The cases reported, relating to the **LIABILITY OF THE MASTER FOR INJURIES SUSTAINED BY EMPLOYEES**, comprise all the decisions on the subject rendered in the courts of last resort in the States and Territories of **GEORGIA, HAWAII, IDAHO, ILLINOIS (SUPREME AND APPELLATE COURTS), INDIANA (SUPREME AND APPELLATE COURTS), INDIAN TERRITORY, and IOWA**. They are classified according to different branches of employment, all cases relating to a given topic being grouped and arranged in such a manner that the practitioner may avoid the necessity of constant reference to numerous places in the volume.

Many **NOTES** and **ANNOTATIONS** appear throughout the volume, a complete list of which appears at the end of the **TABLE OF CASES REPORTED**.

Especial attention is called to the **CLASSIFIED NOTES OF CASES** in the several States, a feature which, it is hoped, will prove of service in the making of briefs and in the search for cases on similar points. These **NOTES** show the cause and nature of the injury, affirmance or reversal of judgment, and the amount of the verdict wherever the same is stated in the official report. As there are more than 1,200 cases reported in this volume, including several decisions on many of the cases, the Editor feels that the plan of **CLASSIFIED NOTES** is a practical and convenient method of including all cases on the subject treated, which will enable the vast number of cases to be kept within reasonable bounds in the matter of volumes to be devoted to the law of **MASTER AND SERVANT**.

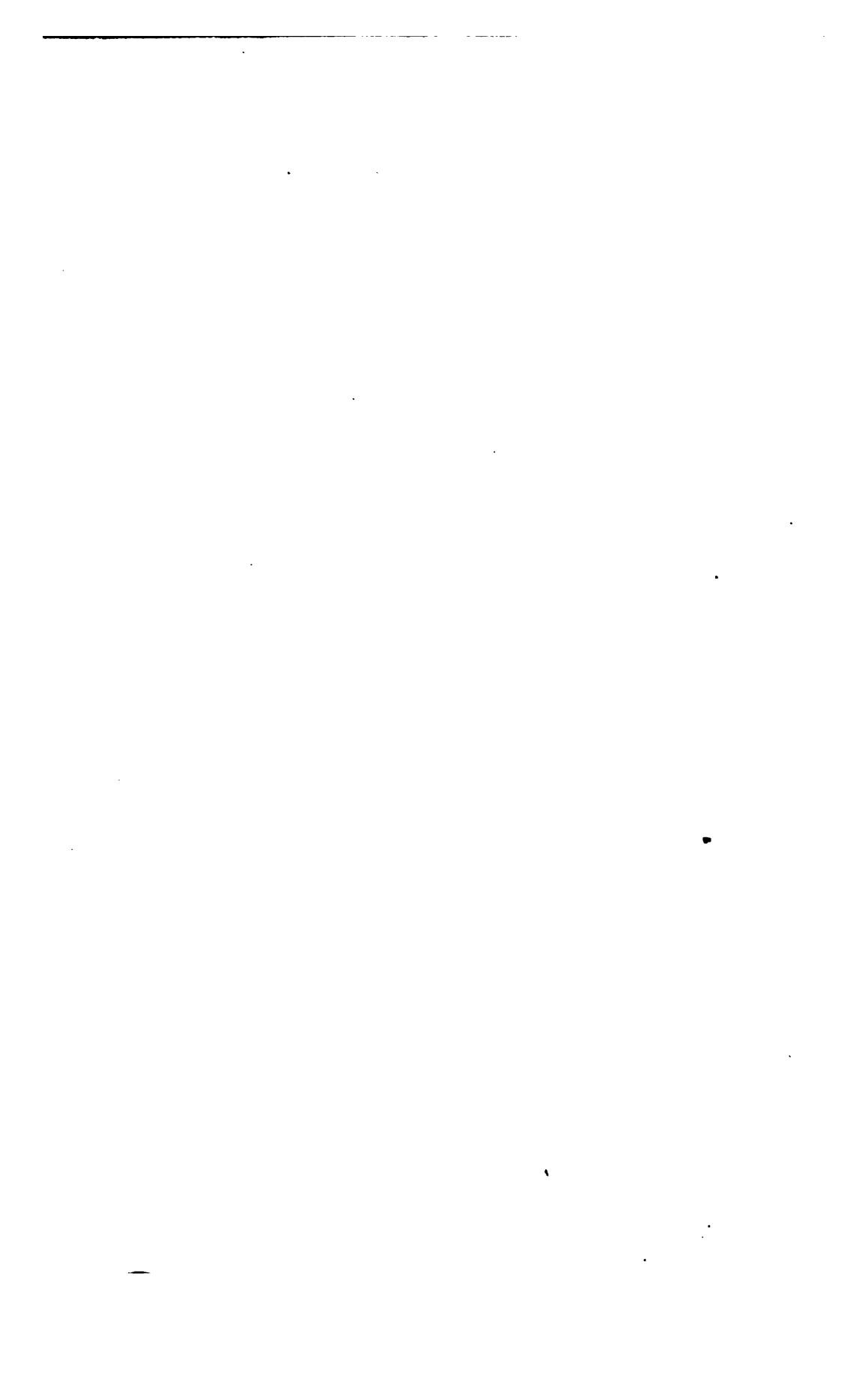
Numerous notes and abstracts of **ENGLISH CASES** and rulings also appear in the volume.

Attention is called to the **INDEX** and the **TABLE OF CASES CLASSIFIED** which precedes the **INDEX**, a reference to which will enable the practitioner to find, without difficulty, any particular case or point in his search for authorities on a given topic arising out of the law of **MASTER AND SERVANT** covered in the volume.

**MASTER AND SERVANT CASES** in States not reported in this (Vol. 14) or the preceding volume will comprise the matter for the next volume of **AMERICAN NEGLIGENCE CASES**.

WALTER J. EAGLE.

NEW YORK, April, 1904.

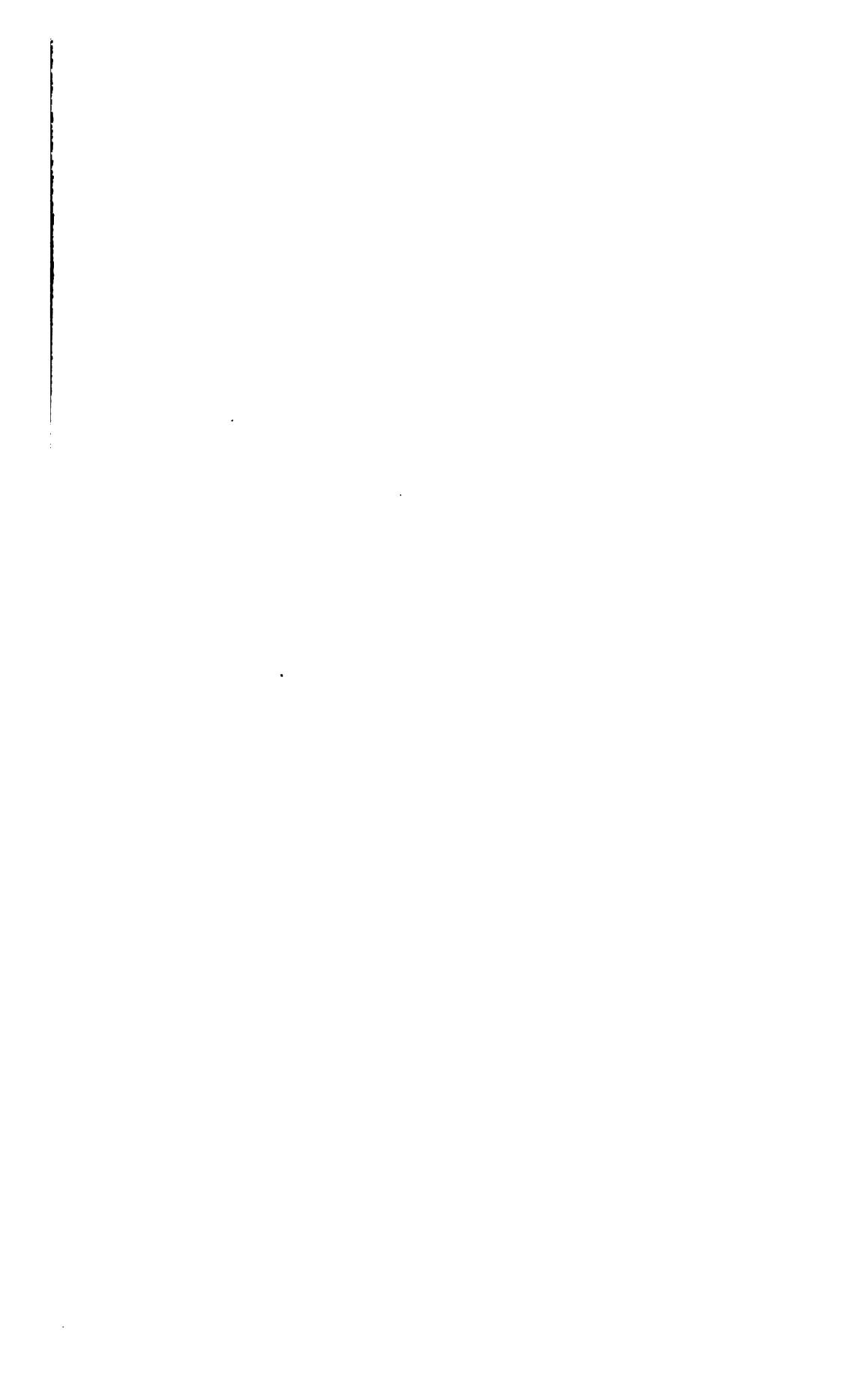


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# AMERICAN NEGLIGENCE CASES.

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## MASTER AND SERVANT.

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### CRUSSELLE v. PUGH.

*Supreme Court, Georgia, September Term, 1881.*

[Reported in 67 Ga. 430.]

**FRAUD — QUESTION FOR JURY — PRACTICE — INJURY TO EMPLOYEE CAUSED BY ACT OF FELLOW-EMPLOYEE — LIABILITY OF MASTER — LESSOR AND LESSEE — LIABILITY FOR INJURY TO SERVANT — BLASTING — EXPLOSION.** — 1. The existence of fraud is a question of fact, and if there be testimony tending to show it, the question should be left to the jury.

2. If counsel for the plaintiff made a concession of fact favorable to the defendant, and the court stated to the jury that the fact had been conceded by plaintiff's counsel, it was no ground for new trial at the instance of the defendant.
3. A master is generally not liable to one employee for injuries resulting from the negligence of a co-employee. He may become liable if he fails to use ordinary diligence in employing competent servants, or retains an incompetent servant after knowledge of his incompetency, and damage results therefrom (1).

1. **Master and Servant Cases in the Series of American Negligence Cases and American Negligence Reports.** — Numerous cases arising out of the relations of Master and Servant and the Liability of the Master for Negligent Acts of the Servant causing Injuries to Third Persons are reported in the several published volumes of **AMERICAN NEGLIGENCE CASES** (vols. 1-12), the decisions being chiefly those in which Carriers of Persons are concerned. Vol. 8 AM. NEG. CAS., which is devoted to the cases bearing on the Liability of the Carrier for the Arrest, Assault and Ejection of Passengers is especially pertinent to the subject of Master and Servant on account of the

4. A lessor is not liable to a servant of the lessee for damages resulting from the negligence of the latter, unless some duty remained upon the lessor from a failure to perform which the injury arose.  
 (a.) It would make no difference that the servant injured was originally employed by the lessor, was ignorant of the lease, and supposed he was still so employed.

*(Syllabus to the official report.)*

FROM a judgment for plaintiff for \$625, in the City Court of Atlanta, defendant appeals. The facts are stated in the opinion.

*Judgment reversed.*

ARNOLD & ARNOLD, for plaintiffs in error.

MILLEDGE & HAYGOOD, for defendant in error.

**Speer, J.** — Pugh sued Crusselle in the City Court of Atlanta for damages to the amount of \$3,000. He alleged that in April, 1871, he was employed by Crusselle in the capacity of a "striker" for one Gatewood, a blaster, who was also in the employment of Crusselle. That on April 19, 1871, by reason of the carelessness and unskillful manner in which said blaster prepared the drill

many decisions on the question of what acts constitute the servant's scope of employment and the liability of the master therefor. There are cases in that volume decided in all the State and the Federal courts on the question, reference to which will be found useful in connection with the treatment of the topic of Master and Servant in vols. 13 and 14 and succeeding volumes of AM. NEG. CAS. Reference should also be made to vols. 11 and 12 AM. NEG. CAS., in which several Master and Servant cases are reported under the subject of Collisions and Crossings covered in those volumes.

The cases reported in the AMERICAN NEGLIGENCE CASES series are arranged in alphabetical order of States and chronologically grouped from the earliest period to 1897.

For actions arising out of the relations of Master and Servant in Personal Injury cases, from 1897 to date, see vols. 1-14 AM. NEG. REP., and the current numbers of that series of Reports. The AMERICAN NEGLIGENCE REPORTS supplement the AMERICAN NEGLIGENCE CASES, and contain the cases on all

branches of the Law of Negligence decided from the year 1897 to date, including a series of current cases on the subject.

**Injuries to Employees.** — The cases reported in this volume (14 AM. NEG. CAS.) relate to actions brought by employees to recover damages for injuries sustained in the course of employment and the liability of the employer, and comprise the decisions of the Appellate and Supreme Courts of Georgia, Hawaii, Idaho, Illinois, (Appellate and Supreme Courts), and also in the courts of the District of Columbia and the Territory.

The cases reported in vols. 1-14 AM. NEG. CAS., on the subject of Master and Servant, are those decided in Alabama, Arizona, Arkansas, California, Colorado (Supreme and Superior Courts), Connecticut, Dakota, Florida (Supreme and Superior Courts), District of Columbia and Florida.

**Special Notes on Master and Servant Topics.** — See list of notes on the following pages, and also the series of AMERICAN NEGLIGENCE CASES and AMERICAN NEGLIGENCE REPORTS, vols. 1-14 AM. NEG. CAS. 2.

charge of powder exploded prematurely, by reason of which the eyes of the petitioner were so injured as to cause him great pain, and finally to deprive him of his eyesight. He further alleged, as part compensation for the loss and injury done the petitioner he, the defendant, authorized petitioner to buy of one Dill a certain house and lot at the price of \$200, which he promised to pay for and convey by deed to petitioner. That said lot was purchased, and in August, 1872, petitioner moved into it with his family under the belief that the defendant had the title made to petitioner. That sometime after that, petitioner learning the deed had not been so made, he saw the defendant, and he to allay the fears of petitioner promised he should have the house and lot during his life. But, notwithstanding such promise, defendant had, in May, 1880, ejected petitioner from the place thus given as part compensation for the damage done him in the loss of his eyesight, etc.

Subsequently plaintiff amended his writ alleging that defendant, Crusselle, constituted Gatewood as his agent in his stead to take charge of and direct the blasting of the rock in the quarry of Crusselle, and plaintiff was hired by Crusselle to work under said Gatewood, to obey his instructions and do whatever he should order about blasting. That the work is a dangerous one unless directed by a skillful man, one experienced in the business. Plaintiff was employed only as a striker, and knew nothing about blasting. That he consented to work under Gatewood only with the understanding that Gatewood knew his business. On the contrary, Gatewood was grossly ignorant of the business, and this incapacity was known to defendant, or would have been known to him had he taken ordinary care and diligence to inform himself; but in disregard of his duty, defendant put Gatewood in charge of the work, and by reason of his unskillfulness and carelessness, the blast of powder exploded prematurely and destroyed the eyesight of plaintiff, and this without fault or negligence on the part of the plaintiff. And plaintiff avers he would have brought his suit long ago against defendant for this damage and injury, but that defendant quieted him and induced him not to do so, by agreeing that he should have the title to the house and lot on Berry street, in the city of Atlanta, which plaintiff had been occupying since the purchase from Dill until he was illegally ejected in May, 1880, by defendant. The property is worth \$500, and from \$4 to \$5 per month rent. Plaintiff

alleges his age at the time of the damage at 44 years, and he has a wife and children dependent; but he, defendant, has stated to divers persons he had given plaintiff the house as compensation for damages, etc. That defendant had ejected plaintiff and his family, poor and dependent, from the house. I therefore brings his suit, etc. To this suit defendant plead the general issue and statute of limitations.

On the trial the jury returned under the evidence and charge of the court, a verdict in favor of the plaintiff for the sum \$625; whereupon the defendant made a motion for a new trial on the various grounds as set forth in the record, which was overruled by the court, and plaintiff excepted.

1. The first ground of error was in not nonsuiting the plaintiff on the conclusion of his testimony, the defendant having filed a plea of the statute of limitations. It is alleged, and such is the evidence, that this wrong was inflicted in April, 1871, the suit not having been instituted until 1880, the defendant claiming that the suit was barred by lapse of time. It is claimed by the plaintiff in reply to the plea of the statute, that defendant has been guilty of a fraud "by which the plaintiff has been debarred or deterred from his action; and by reason thereof the limitation only commenced to run from the discovery of the fraud."

Fraud, in reply to the statute, being a question of fact, went to the jury, and there being facts and circumstances in the evidence affecting this failure to sue within the period of limitations which went to support this reply to the statute of limitations, we find the court did right to overrule this motion for a nonsuit and submit, as he did, to the jury the whole evidence, including evidence of fraud, and leave it for them to say whether defendant had been guilty of such fraud as "debarred or deterred plaintiff from bringing this suit within the two years as prescribed by the statute. So that neither in the refusal of the court to sustain the nonsuit, nor in his charge to the jury in submitting the question of alleged fraud, in reply to the statute, do we find any error on the part of the court below.

2. The second ground of alleged error is in the court charge "It is conceded by counsel for plaintiff that Mr. Pugh has pecuniarily damaged to one-half of his capacity to labor." due to the court below to say, in making use of this language, was speaking of what had been severally acceded to by counsel

either side in the way of proof or admission. He said to the jury, to relieve them from calculations, "that by agreement of counsel on both sides, in one instance, and the concession of counsel for plaintiff, in the other, etc., that plaintiff's expectation of life, according to the tables of mortality, based upon his age at the time of the accident, is twenty years; and it is conceded by counsel for plaintiff in the other that Pugh has been permanently damaged to one-half of his capacity to labor." We see no error against the defendant in this statement of the court to the jury. If plaintiff chose to concede his injury only extended to "one-half his capacity to labor," it was an admission that did not bind defendant, and properly only operated to the disadvantage of the plaintiff. Few men who are blind are to be found, we presume, who are half so efficient for labor as men who have their eyesight. Neither do we find any error on the part of the court in charging the jury as set forth in the 3d, 4th, 5th, 6th, 7th, 8th and 9th grounds of the motion, when taken in connection with the entire charge as set forth in the record.

3. The tenth alleged ground of error was in the court charging the jury: "If they should believe, from the evidence, that when plaintiff originally went upon the work that he was in the employ of defendant, Crusselle, and that Pugh, at the time of the accident and up to the time of the accident, believed he was working still under Crusselle and had not been notified of Crusselle's subletting the quarry to Gatewood, then Crusselle would be liable to Pugh for the extent of the damage for the accident that happened to him (Pugh) provided you should believe that if it had been Gatewood solely, Gatewood would be liable; and in not charging the jury "if plaintiff did have notice of the change of masters, or by the exercise of ordinary diligence could have known it, defendant would not be liable at all for the alleged injury."

We recognize, of course, the doctrine contended for by counsel for defendant in error, and as expressed in the Code, that "the principal is not liable to one agent for injuries arising from the negligence or misconduct of other agents about the same business." Code, section 2202; 1 Kelly, 198; McDonald *v.* Eagle & Phenix Mfg. Co., 67 Ga. 761, 68 Ga. 839. (1) \* \* \*

[The court quoted from the McDonald case, *supra*, and discussed the principles as set forth in the third and fourth

1. See the McDonald case., 68 Ga. 839, the case following the case next reported herein, page 12, *post*.

paragraphs of the official headnote to the report, citing, among other cases, *McDonald v. Eagle & Phenix Mfg. Co., supra*, and *Norton v. Wiswall*, 26 Barb. 618.]

After discussing the facts as to the relations of the parties the court said:

"In view of these facts, we must hold that the rule of liability which the court gave in the charge to the jury, and excepted in the tenth ground of the motion, was error. To charge that because Pugh went to work originally under Crusselle, and to and at the time of the accident he believed he was still working under Crusselle, and had no notice of the sub-letting of quarry to Gatewood, then Crusselle would be liable, if Gatewood was liable, for the injury, we think was error under the rule of law we have sought to lay down in this opinion." \* \* \*

Judgment reversed.

## BAIN v. THE ATHENS FOUNDRY AND MACHINE WORKS.

*Supreme Court, Georgia, October Term, 1885.*

[Reported in 75 Ga. 718.]

**EMPLOYEE KILLED BY NEGLIGENT BLASTING — CRIMINAL NEGLIGENCE — INSTRUCTION.** — I. In a suit by a widow for the homicide of her husband, resulting from certain blasting, which was being done for the purpose of enlarging the foundry building of the defendant, the court having charged that if the defendant was negligent, such negligence is amount to criminal negligence, before the plaintiff could recover, the charge fell short of giving the whole law to the jury, and was calculated to mislead them and to withdraw their minds from the main issue involved — point. He should have charged that, if the evidence showed that the hole followed the direction of the hole drilled, and if the hole was so directed as to direct the blast against a house near by, in which there was a number of persons, among whom was the deceased, they should take this into consideration in determining whether the defendant was guilty of criminal negligence (1).

I. In *Houston v. CULVER, REYNOLDS & COMPANY*, 88 Ga. 34 (November, 1891), the official syllabus states the case as follows: "The action being for employing an incompetent superintendent, and for negligence on the part of the superintendent in directing a hole to be drilled for blasting where a charge blast was already in, and being no evidence either of the competency of the superintendent if competent, he could, by the proper diligence, have known the previous charge had not exploded, the judgment of nonsuit is correct."

2. EMPLOYEE IN BUILDING KILLED BY NEGLIGENT ACT OF BLASTER IN EMPLOY OF SAME MASTER — FELLOW-SERVANT — INSTRUCTION. — Although two persons were employed by the same master, yet where one of them was employed as a blaster for the purpose of removing certain rocks on the master's property, and alone had charge of the work of blasting, and the other had nothing to do with it, but was employed as a wood-workman in the foundry of the master, they were not fellow-servants in the legal sense of the term, and a charge based on that assumption was erroneous, though it may have been a correct abstract statement.
3. CONTRIBUTORY NEGLIGENCE — EVIDENCE — INSTRUCTION. — There being no evidence to show that the deceased contributed in the slightest degree to the injury which caused his death, the charge of the court on the subject of contributory negligence was not founded on the evidence, and was erroneous.
4. VERDICT CONTRARY TO EVIDENCE. — The verdict in this case is not only contrary to the evidence, but is without evidence to support it. If the testimony in the case is entitled to credit, there should have been a verdict for the plaintiff.

*(Syllabus to the official report.)*

APPEAL from verdict and judgment for defendant in the Clarke Superior Court. *Judgment reversed.*

Mary A. Bain brought suit against the Athens Foundry and Machine Works to recover for the homicide of her husband, laying her damages at \$25,000. On the trial the evidence for the plaintiff was, in brief, as follows:

On September 6, 1882, the husband of the plaintiff was employed as foreman in the wood department in the works of the defendant, and had been so employed for a number of years. The company was enlarging its buildings, and for that purpose it was necessary to blast away certain rocks in order to lay a foundation. One Childers was employed to do the blasting. He was a drinking man, and people generally spoke of him as a reckless blaster. The plans for the foundation were drawn by an architect. Thomas Bailey was superintendent of the foundry, and had charge of the work of blasting. He gave directions to Childers, the blaster, and furnished him with logs or timbers to be put over the blast to prevent injury from it, or, as a witness testified, he told Childers to go into the lot and get such timbers as were there for that purpose. The timbers used were chestnut posts or logs. To make a blast near a street or public place safe, the best method is to place heavy logs or timbers over the intended blast, and chain them down. This blast was near a public street. Childers drilled a hole in the rock, pointing in the direction of the building where Bain was at work, which was

calculated to throw the broken pieces in that direction. The blast was set off, and a large rock, the weight of which was estimated at from seventy-five to eighty-six pounds, was thrown a distance variously estimated at from seventy-five to one hundred and fifty feet, breaking through a window and striking Bain, causing his death. The work-bench ran along the wall in front of the window and on each side of it. The wounds found upon the deceased were on the left side and rear portion of his head. No one saw him at the moment of being struck, but immediately after the rock came through the window, he was seen to be lying on the floor. The rock came through the window at a height of about nine feet from the floor, and struck a tool-chest fifteen sixteen feet from the window. After the death of Bain, other and heavier timbers were furnished to Childers, and he continued the blasting under the direction of Bailey. At the time of the injury, the blast was unusually heavy. On Bain's work-bench was a part of a pattern and a piece of sandpaper, with which he had been working just before the blast. One witness testified that once he saw Bain out where the blasting was being done, but that Bain had nothing to do with the blasting that he knew of, it being under the charge of Bailey. To contradict this testimony given by Childers, the testimony of two or three witnesses was introduced, to the effect that, sometime after the injury, Childers had said in conversation that Bailey had promised before this to furnish heavy weights for the blasting; that the hole drilled pointed in the direction where Bain was; that the weights used were not heavy enough to prevent the rocks from flying, and that that caused Bain's death; that Bailey had sent him to get some timbers, and he got all he saw. The deceased was fifty-five years of age, was in good health, and earned \$125 per month. The tables of life expectancy were introduced.

The evidence for the defendant was, in brief, as follows: The plans for the new building, which was to be erected to increase the capacity of the shops, were drawn by W. W. Thompson, architect. Bailey, on his direct examination, testified that he employed Childers "and turned it all over to Mr. Bain; that Bain was foreman in the wood department; that Bain and the witness laid off the foundation, and after it had been completed, Bain told the witness that it was a foot too short and would have to be extended that much further; and it was in blasting time that the injury occurred; that Bain had charge of the plan."

kept them; that he complained that the work was not progressing with sufficient rapidity, and wanted more force hired; that the witness told Childers always to send a man on the street and the helpers through the shop to halloo when he loaded the blast, and to give another alarm when about to fire; and that such alarms were given; that the witness had told Childers to take a team and go into the lot and get such timbers as he could find; that there were chestnut posts, some sills and some chunks — did not recollect clearly." On cross-examination, Bailey testified that he had general supervision of the work, and spoke to Childers and Bain about it; that he regulated Childers; had a right to discontinue the work, put in new hands or make any change he saw fit; and that the company purchased the materials Childers used. Another witness testified that the foundation blasted out was a foot shorter than the plans called for, and that Bain said it must come out or be blasted out. Bailey stated that the same timber was furnished to Childers after Bain was killed, and that Childers continued work until the job was finished; that Mr. Thomas was there once or twice a day; that Childers drank some, but he never knew him to drink while at work. Thomas testified that he turned over the work to Bain; that he (witness) went there frequently, especially when Bain wanted to know something about changing the plans, or whether he had something right or not; and that Bain said the corner was not low enough, and he was going to have it blasted out. Childers, the blaster, testified that he was working immediately under Bain's direction; that Bain laid it off, was out there daily, and watched the witness to see if he got to the line; that Bain had been warned to keep his head out of the window, or a rock might go in there and hurt him; that Bain would invariably look out to see the execution of the blast; that he considered the precaution used sufficient to insure safety; that on the morning of the injury, the witness spoke to Bailey and thought he had gone far enough on the north end of the foundation; that Bain said he had not gone far enough by a foot; took out his tape-line, measured it, and stuck up a stick, and said it had to be blown out. On cross-examination, he stated that he did not recollect making certain contradictory statements about Bain's looking out of the window and how the accident occurred; that he got new timbers every day; that he knew when the hole was drilled that the blast would go in the direction in which it pointed. Other witnesses testified that the

two alarms were given as usual; one stated that Bain got off the bench, and when the witness last saw him, he was looking out the window. One alarm was always given when the blast was ready, and the second when the fuse was lit. The wall on the side of the building was brick, and a man standing behind the wall would be protected from the blast. One witness stated that just before the blast which caused his death, Bain was on the lower floor of the building; that the witness asked if there was any danger — wouldn't it be safer on the lower floor than stairs? but Bain replied that he did not consider there was a danger, and went up stairs to the room in which he ordinarily worked. Bain had been sick a short time before the accident and was not making full time at his work, generally losing one or two days in a month. He was receiving \$3.75 per day. Other testimony was introduced, principally for the purpose contradicting witnesses, to show the payment of burial expenses and certain money to the plaintiff, including the wages due her husband, and conversations which took place between her and the agent of the company.

The jury found for the defendant. The plaintiff moved for a new trial on the following grounds: 1 and 2. Because the verdict is contrary to law and evidence. 3. Because the court charged the jury as follows: "The statute of this State gives to a widow a right of action for damages against one who kills or causes the death of her husband, when such death is produced by acts of commission or omission which make the killing amount to a homicide in the criminal sense of that word — that is, to either murder or manslaughter. Under this law, it is incumbent upon the plaintiff to show, not that defendant is chargeable with ordinary neglect, that it failed to exercise that degree of care and diligence which persons of ordinary diligence use, but she must go farther and satisfy the jury that death was caused by some intentional act or by the criminal negligence of the defendant. This is the sense in which 'negligence,' as applied to defendant's conduct, is used in these instructions. Under the circumstances stated, the defendant would be chargeable with criminal negligence, but to justify you in so finding, the evidence should satisfy you that the killing was the result of such criminal negligence; otherwise the defendant would not be guilty of the homicide alleged, and, therefore, not liable to the plaintiff damages." 4. Because the court erred in charging the jury

follows: " It was the duty of the defendant not only to employ in the business of blasting a competent, skilful and careful servant, but to furnish him suitable materials and instrumentalities in performing the work. If it filled the measure of its duty in these respects, it would not be liable for the result." .5. Because the court erred in charging the jury as follows: " If the work of blasting, under the circumstances stated, was work of a dangerous character, so dangerous as to render it probable that the life of the deceased might be destroyed, and if, in the prosecution of it, the defendant failed to use proper care and diligence to avoid such a result, and the killing of deceased was the result of carelessness and neglect on defendant's part, then the defendant would be liable; and so, if the work of blasting was one of a dangerous character, and was prosecuted in a manner whereby the employee in the building was exposed to risk not known to him, and to dangers not apprehended by him, and which were the probable consequences of the blasting, and that the blasting was done in an incompetent, unskilful and careless manner, and in consequence of such carelessness and negligence deceased was killed, the defendant would be liable for damages, unless the deceased, by his own want of care and diligence, contributed to his death." The court overruled the motion, and the plaintiff excepted.

T. W. RUCKER, E. K. LUMPKIN and A. J. COBB, for plaintiff in error.

ALEX. S. ERWIN and POPE BARROW, for defendant.

**Blandford, J.** — A verdict having gone in favor of defendant, the plaintiff moved the court for a new trial, which was refused.

The court charged the jury that, if the defendant was negligent, such negligence should amount to criminal negligence before the plaintiff could recover; but the charge fell far short of giving the whole law in charge to the jury. He should have stated that, if the evidence showed that the blast followed the direction of the hole drilled, and if the hole was so drilled as to direct the blast against a house near by, in which there was a number of individuals, among whom was the deceased, they should take this into consideration in determining whether the defendant was guilty of criminal negligence. The charge, as given on this point, was calculated to mislead the jury and to withdraw their minds from the main issue involved in this point.

Again, it is insisted that the whole of the charge as to deceased's being a fellow-servant with Childers, the blaster, is erroneous,

because the same is mere abstract law. This assignment of error is well founded, under the evidence in the case, which is uncontradicted. Childers alone had charge of the work of blasting; with this work Bain had nothing to do; he was in no sense a fellow-servant with Childers. See Wood's *Master and Servant*, 840, 841. So we think that this part of the charge was abstract law, and should not have been given by the court.

Complaint is also made of the charge of the court as to tributary negligence on the part of the deceased. While the law on the subject was correctly stated by the court, there was no evidence in this record to show that Bain contributed in the slightest degree to the injury. He was at his place of business in the place where he should have been; he apprehended no danger to himself, but he was killed by the recklessness of the爆破工 in directing the blast against the place where he was.

The verdict in this case is not only contrary to the evidence, but without evidence to support it. If the testimony in this case is entitled to credit, there should have been a verdict for the plaintiff.

Judgment reversed.

### McDONALD v. THE EAGLE AND PHENIX MANUFACTURING COMPANY (1).

*Supreme Court, Georgia, February Term, 1882.*

[Reported in 68 Ga. 839.]

**DEATH OF EMPLOYEE CAUSED BY ACT OF FELLOW-SERVANT — DEFECTIVE APPLIANCE — DERRICK — CRIMINAL NEGLIGENCE — FELLOW-SERVANT — SELECTION OF SERVANT — DECISION — CONTRACT — TORT. — 1. To entitle the widow of a servant to recover against a principal for the negligence of a fellow-servant, or against a principal for the homicide of the husband which resulted from such negligence, it must appear that the homicide amounted to a crime or neglectful servant, either murder or manslaughter of some grade.**

1. The following note appears to the reporter, Mr. Peeples, of the clerk's official report of the McDonald case in 68 Ga. 839: "By reference to 67 Ga. 763, it will be seen that the original decision in this case was withdrawn from the reporter's hands by Justice Speer, who stated that he handed it to the reporter; that Mr. Peeples had no recollection of the occurrence; and that it never turned to the reporter. Since publication of the 67th Ga., it covered among a lot of was."

2. A principal is not liable for the negligence of a fellow-servant in the same job, unless the principal himself was negligent in not using ordinary diligence in selecting the fellow-servant, or in retaining him after knowledge of incompetency or negligence. Nor will the bare fact that the servant

which were gathered up from the court room. It is now published at once upon its discovery."

The decision referred to in the case of *McDonald v. The Eagle and Phenix Mfg. Co.*, 67 Ga. 761 (see the official reporter's note in the preceding paragraph herein) is as follows: "Charlotte McDonald, the widow of Absalom McDonald, brought suit against The Eagle and Phenix Manufacturing Company for the homicide of her husband. The body of her declaration was as follows: 'For that heretofore, to wit, on the — day of June, 1879, at the request of defendant, Absalom McDonald, who was her lawful husband, and up to the time the injuries hereinafter stated were received by him, was a carpenter by trade, forty-seven years old, in good health and of a strong constitution, and whose services were worth an average of two dollars per day, was employed by the said defendant as an ordinary workman to aid in building a dye-house in said county of Muscogee, the said defendant undertaking to furnish a careful, prudent and skilful superintendent to direct said work, and competent and careful laborers to aid in constructing the same, and especially to manage a derrick and ropes, tackle and machinery attached to said derrick, by which large timbers were to be hoisted to a great elevation, which said timbers your petitioner's said husband was to adjust and put in place in the frame-work of said building, when carefully conveyed to him by means of said derrick and ropes, tackle and machinery, attached by said laborers under the orders and directions of said superintendent. Yet the said defendant, not regarding its duty, placed in charge of said derrick and ropes, tackle and machinery attached,

a careless and negligent superintendent, and one or more careless, incompetent and negligent laborers, and by the want of the care and diligence, and by negligence, so managed the said derrick and ropes, tackle and machinery used to hoist said heavy timbers, as to knock the prop which supported her said husband from under him, and precipitated him from a great elevation upon some timbers near the ground, when a large piece of timber, suspended by means of said derrick, by which said fall and fall of said heavy piece of timber, her husband was crushed, bruised, wounded and so hurt that he languished in great pain and died, by reason of said wound, within twelve hours afterwards, and from thence and for all time deprived your petitioner of the companionship, comfort, labor and service of her said husband; that at the time said fall occurred which so occasioned the death of her said husband, he was faithfully, cautiously, diligently, and without any fault on his part, performing his duty under the direction of defendant. Your petitioner was thereby forced to lay out and expend divers sums of money, in the whole amounting to one hundred dollars, for attention in sickness and burial expenses of her said husband, while she endures inconsolable grief, and has sustained other damages to the amount of ten thousand dollars.' Defendant demurred generally to this declaration; the demurrer was sustained (in Muscogee Superior Court) and plaintiff excepted."

In the McDonald case, 67 Ga. 761, the official reporter has added the following note:

"The original opinion in this case was prepared by Chief Justice Jackson. After being so prepared, Justice Speer

afterwards became negligent show—without more—negligence in the principal in selecting.

3. One may waive the special contract and sue in tort for breach of duty if there were such special contract, and the contract might warrant the tendency and care of the fellow-servant, and be then invoked to change the legal principle on which the liability of the principal would turn for

took it from the reporter for the purpose of making a citation in another case. He states that he handed it to Mr. Peeples, of the clerk's office, with instructions that the latter should hand it to the reporter. This was never done, however, and it never reached the reporter's hands. Mr. Peeples has no remembrance of receiving it from Justice Speer, and upon being called on for it by the reporter, he was unable to find any trace of it in the clerk's office. In order to obviate as far as possible this loss, the headnotes are published as prepared and revised by Chief Justice Jackson, and the following extract from the decision is appended, being taken from the decision in the case of *Crusselle v. Pugh*, September Term, 1881, where it was copied by Mr. Justice Speer."

The citation referred to in the preceding paragraph (see *Crusselle v. Pugh*, 67 Ga. 430, 435, 14 AM. NEG. CAS. I, *ante*) is as follows:

"The principal is liable for his own negligence or misconduct, and hence his liability rests on his own negligence or misconduct in the employment of his agents; and if he uses ordinary diligence in employing competent men, it is enough to relieve him. He is not liable for the negligence of a fellow-servant while engaged in the same employment, unless he has been negligent in the selection of that servant, or retained him after knowledge of his incompetency. Nor will the fact that the person is found incompetent, of itself, and without more, show negligence of the master; but it must further appear that the master knew or might have known, by ordinary diligence, the incompetency of the agent or servant.

Law of Master and Servant, 423-432; 2 Thomps. 969; Shear Redf. 31; 1 Am. Railw. 536."

The headnote to the McDonald 67 Ga. 761, as prepared by Chief J Jackson, is as follows:

"To entitle the widow of a servant to recover against a principal for negligence of a fellow servant or principal for the homicide of the servant, which resulted from such negligence, it must appear that the homicide amounted to a crime in said negligence, either murder or manslaughter of some grade.

"2. A principal is not liable for negligence of a fellow-servant in the same job, unless the principal himself was negligent in not using ordinary diligence selecting the fellow-servant or in retaining him after knowledge of incompetency or negligence. Not the bare fact that the servant afterwards became negligent shows out more—negligence in the principal in selecting.

"3. One may waive the special contract and sue in tort for breach of duty if there were such special contract, and the contract might warrant the tendency and care of the fellow-servants and be then invoked to change the legal principle on which the liability of the principal would turn for tort; but no special contract is in this declaration so as to vary the general legal principle.

"4. A workman engaged in the same job with two or three others, having the direction of it, is no general superintendent of a corporation as to bind it as such, but stands in the footing of a mere fellow-servant.

- tort; but no special contract is set out in this declaration so as to vary that general legal principle.
4. A workman engaged in the same job with two or three others, and having the direction of it, is not a general superintendent of a corporation, so as to bind it as such, but stands on the footing of a mere fellow-servant.
  5. The law as to railroads and druggists rests on other grounds.  
*(Syllabus to the official report.)*

APPEAL from dismissal of case in the Muscogee Superior Court.  
*Judgment affirmed.*

Charlotte McDonald sued the Eagle and Phenix Manufacturing Company to recover damages for the homicide of her husband. On demurrer the court dismissed the case, the plaintiff excepted. The declaration was as follows:

"The petition of Charlotte McDonald showeth that the Eagle and Phenix Manufacturing Company, a corporation of the State of Georgia, resident in the county of Muscogee, has damaged your petitioner in the sum of \$10,000. For that heretofore, to wit, on the — day of June, 1879, at the request of defendant, Absalom McDonald, who was her lawful husband, and up to the time the injuries hereinafter stated were received by him, was a carpenter by trade, forty-seven years old, in good health and of a strong constitution, and whose services were worth an average of two dollars per day, was employed by the said defendant as an ordinary workman to aid in building a dye house in said county of Muscogee, the said defendant undertaking to furnish a careful, prudent and skilful superintendent to direct said work, and competent and careful laborers to aid in constructing the same, and especially to manage a derrick and ropes, tackle and machinery attached to said derrick, by which large timbers were to be hoisted to a great elevation, which said timbers your petitioner's said husband was to adjust and put in place in the framework of said building, when carefully conveyed to him by means of said derrick and ropes, tackle and machinery attached, by said laborers, under the orders and direction of said superintendent. Yet the defendant, not regarding its duty, placed in charge of said derrick and ropes, tackle and machinery attached, a careless and negligent superintendent, and one or more careless, incompetent and negligent laborers, and by want of due care and diligence, and by negligence, so managed the said derrick and ropes, tackle and machinery used to hoist said heavy timbers, as to knock the prop which supported her said husband from under him, and precipitated him from a great height upon some tim-

bers near the ground, when a large piece of timber, suspended by means of said derrick, fell upon him, by which said fall of said heavy piece of timber her said husband was crushed, wounded, and so hurt that he languished in great pain and died by reason of said wounds within twelve hours afterwards and from thence and for all time deprived your petitioner of companionship, comfort, labor and services of her said husband. That at the time said fall occurred, which so occasioned the death of her said husband, he was faithfully, cautiously, diligently, without any fault on his part, performing his duty under direction of defendant. Your petitioner was thereby forced to lay out and expend divers sums of money, in the whole amounting to one hundred dollars, for attention in sickness and burial expenses of her said husband, while she endures inconsolable grief; and has sustained other damages, to the value of two thousand dollars."

SMITH & RUSSELL, for plaintiff in error.

PEABODY & BRANNON, for defendant.

**Jackson, Ch. J.**—This was a general demurrer to plain declaration, in which she declared against the Eagle and Pilot Manufacturing Company for the homicide of her husband. Demurrer was sustained and the action dismissed and this judgment is assigned as error.

This is an action authorized by statute, and the statute is referred in section 2971 of our Code. It authorizes the widow to sue for the homicide of her husband. The term homicide, used in the statute, means the killing of the husband in some unlawful manner. Code, § 4313. Of course, it cannot mean justifiable homicide, for it would be out of all reason to permit a recovery of damages from a person who had committed no unlawful act, whom the law justified in doing what he did. The statute therefore, means some grade of unlawful homicide. It is alleged in the declaration that this corporation voluntarily through any agent or servant killed this man, nor is it averred that the homicide occurred by criminal negligence on the part of the company or any of its agents. The facts alleged do not show that any agent or servant of the corporation was guilty of murder or of any grade of manslaughter, voluntary or involuntary. If any criminality attached in this case, it was clearly unintentional and must have made a case of involuntary manslaughter. Is that offense?

The Code, section 4327, declares that "involuntary manslaughter shall consist in the killing of a human being without any intention to do so, but in the commission of an unlawful act, or a lawful act which probably might produce such a consequence in an unlawful manner." No unlawful act is alleged to have been committed here, nor any lawful act which probably might produce such a consequence in an unlawful manner. The allegation is that the defendant employed a careless and negligent superintendent to manage a derrick, and ropes, tackle and machinery attached, and one or more careless, incompetent and negligent laborers, whereby the plaintiff's husband fell, by want of their care and diligence. It goes only to this extent. It does not make the case of voluntary or of involuntary manslaughter against anybody; and for such an accident, though it might have been avoided by care and diligence, we do not think that there can be a recovery under the statute. And so this court has held in principle. September term, 1880, *Daly v. Stoddard*, 66 Ga. 145.

And here we might rest this case. But even if death had not ensued, and the action had been by the injured man for damages, under both the common law and the Code, we do not think the declaration sufficient. The Code seems emphatic: "The principal is not liable to one agent for injuries arising from the negligence or misconduct of other agents about the same business; the exception in case of railroads has been previously stated." Code, § 2202. It is for his own negligence or misconduct that he is liable; and hence his liability rests on his own negligence or misconduct in the employment of his agents, and if he uses ordinary diligence in employing competent men, it is enough to relieve him. Shearm. & Redf. Neg., 90; 2 Thompson Neg., 971. He is not liable for negligence of a fellow-servant while engaged in the same employment; unless he has been negligent in the selection of that servant, or retained him after knowledge of his incompetency. Shearm. & Redf. Neg., 86; 2 Thompson Neg., 951, 969, 970, and cases there cited. Nor will the fact that the person proved incompetent of itself, and without more, show negligence of the master, but it must further appear that the master knew, or might have known by ordinary diligence, the incompetency of the agent or servant. 2 Thompson Neg., 969; Shearm. & Redf. Neg., 91; 1 Am. Rail. R. 596.

To apply these principles to this case,—there is no allegation

that the defendant was negligent in employing the servants but it is only alleged that it did employ those who were negligent as it turned out. There is no allegation that it did no ordinary diligence to employ competent and careful men, or that it knew when employed that they were not such, or retained them after such knowledge. Squaring these allegations with law, we do not see that, admitting all that is alleged in declaration, there can be a recovery against the company. It is true that this defendant is a corporation, and acts through agents and can act in no other way; but we put its general agent employed these servants, precisely in the place of the company, and hold the company liable precisely to the extent that it would hold its general agent liable had he been principal. If the general agent was negligent, and did not act with ordinary diligence in the employment of these servants for himself, he being an individual person and not acting for the corporation, then he would be personally liable; and if acting as the agent of this corporation to employ these servants, he was neglectful and did not use ordinary diligence, then the corporation would be in like manner liable, but neither would be liable if ordinary diligence was used in the employment of the servants by him who employed them whether as an individual or as an agent of the corporation.

An effort was made by the able counsel for the plaintiff to take this case out of these principles, on the ground that a special contract was made whereby it was stipulated and agreed that the company would employ competent and careful men; but we do not see any special contract set out in the declaration. It seems to be merely based upon the general duty of the employer to the employee. It is not alleged that there was in terms any special contract. It is not alleged that the parties met and made a special contract with stipulations on either side, but the allegation is simply that of the employer's duty to man to do work and corresponding duty on the part of the employer to furnish competent assistants. But if this element had been a special contract, as it is set out, we do not know how it makes the duty stronger than that which the law attaches to every employment of a servant — the duty to use ordinary diligence to employ competent and skillful fellow-servants. True, there might have been a contract made by which the competency and skill and care of the fellow-servants would have been warranted by the corporation, but certainly there is nothing in the declaration to support that.

the sort alleged here. That one may waive the contract and sue for the tort as breach of duty, springing out of the contract, see 1 Add. on Torts, 26 and 27, note 1; 2 Ib., 527; Stokes *v.* Saltonstall, 13 Pet. (U. S.), 181, 7 Am. Neg. Cas. 297; Pierce on R. R. Law, 487-490. This is a case of that sort, if there be any contract here other than ordinary employment.

One of these servants employed in this work is called superintendent, and is alleged to have been at the head of the management of the derrick, etc.; but we do not see that he was such a general superintendent for this corporation as to make it liable as acting through him. On the contrary, the averment only makes him the head of a little job to do that job; and to all intents and purposes a fellow-servant.

The law in respect to the liability of railroad companies and druggists rests on other grounds. Code, §§ 3005, 2083, 3036, 2202  
Judgment affirmed.

**EMPLOYEE'S EYE INJURED BY DEFECTIVE SHUTTLE ON MACHINERY — CONTRIBUTORY NEGLIGENCE — INSTRUCTION.** — In PIERCE *v.* THE ATLANTA COTTON MILLS, 79 Ga. 782 (*October Term, 1887*), judgment for defendant was *affirmed*, the official syllabus sufficiently stating the case as follows: “ 1. Where suit was brought against a cotton factory company by one of its employees, to recover for an injury occasioned to the eye of the plaintiff by a shuttle, and it was alleged that the guard of the shuttle was defective, being an unsafe character of guard, and where the testimony was conflicting as to the safety of the guard, some witnesses testifying that no guard was about as safe as a guard, and others testifying that a guard of the character used was as good as one of a different character, there was no error in charging the jury as follows: ‘ If you believe from the evidence that two kinds of shuttle-guards were in general use on looms, and that ordinarily skilful people using the two kinds were divided in opinion and in their experience with them as to which was the safer, and you further believe that, in the use of ordinary and reasonable care and diligence the defendant could have selected either of the guards for its looms, then the defendant would not be liable for damages caused by the use of such guards on its looms.’ ”

“ 2. Where the declaration alleged that the plaintiff was without fault, and she did not claim damages for contributory negligence in the court below or in this court, but claimed full damages, and did not insist before this court that she was entitled to damages if she

contributed to the injury, there was no error in the charge that servant, to recover of a master on account of negligence, must himself be without fault, and if the plaintiff in this case was herself negligent in any degree, contributing to the occasioning of injury, she could not recover, even though the defendant may have been negligent.

" 3. There was no error in charging that, 'if the plaintiff could by the exercise of ordinary care and diligence on her part, have avoided the injury, she cannot recover, notwithstanding the defendant's negligence, if any.'

" 4. The verdict in this case was right; the charge of the court was right; and there was no error in overruling the motion for a new trial."

EMPLOYEE INJURED BY DEFECTIVE FASTENING ROPE—INSPECTION—PARTNERSHIP.—In **AUSTIN ET AL. v. APPLING**, 88 Ga. 54 (*November, 1891*), employee injured by defective appliance, the official syllabus states the case as follows:

2. "It was not error to decline to charge that if the plaintiff used the same means of knowing the defect in the fastening of the rope the defendant had, he cannot recover, it appearing that the duty of inspection did not rest upon him. Nor was it error to decline to charge that if the plaintiff commenced to use the door knowing its condition and continued in defendant's service, the door remaining in the same condition, his continuance in the service would operate as a waiver of any claims upon the defendants to furnish greater guards, the evidence being that the door did not continue in the same condition.

" 3. Where three persons are sued as a partnership, and they file pleas of non-partnership, and the whole case is tried together, a verdict against all three by name, construed in the light of the pleadings, is a finding that they are all liable as partners and is equivalent to a verdict against the partnership.

" 4. Where three persons compose a partnership under a firm such as the Fulton Lumber and Manufacturing Company, which does not disclose the individual name of any partner, and two of them withdraw and the third continues business at the same place and under the same partnership name, a person dealing with the firm cannot hold the retired members of the firm responsible, if he never dealt with the firm before dissolution and had no knowledge of the persons constituting the same either before the dissolution or at the time of the dissolution in question; this is true, although no notice of the dissolution had ever been given in any manner.

"5. Where three persons are sued as partners, and no partnership is established, the verdict may be against one only.

"6. The recovery being correct as to one of the defendants and obviously incorrect as to the other two, the judgment is *affirmed* as to the *former* but *reversed* as to the *latter* with direction that the action be dismissed as to them." Plaintiff recovered a verdict for \$2,500 in the City Court of Atlanta.

*Employee injured on top of car — Defective machinery — Track — Cross-ties on car — Knowledge of defect.*

In *WHITE v. KENNON & Co.*, 83 Ga. 343 (1889), it was held that "an employee cannot recover for an injury caused by the use of defective machinery, appliances or tools, when he has knowledge of such defect and especially when his knowledge is equal to or better than that of his employer. Where the allegations made by plaintiff show that he either knew or ought to have known the danger of riding on track on a load of cross-ties, he is not entitled to recover. Nor was he entitled to recover on account of an alleged negligence of the engineer, as, according to the facts alleged, the engineer was his fellow-servant." The car of cross-ties, on the top of which ties plaintiff was riding, ran into a bad place on defendants' track, jolted the ties causing them to fall off, and threw plaintiff from the car injuring him severely. Judgment on demurrer to complaint in the Pierce Superior Court was *affirmed*.

*Bridge laborer struck by defective windlass.*

In *CARTTER & COMPANY v. COTTER*, 88 Ga. 286 (February, 1892), day laborer employed upon construction of bridge which was being built by defendants, who were bridge builders, injured by being struck on the head by a windlass which was defective, judgment for plaintiff in the Floyd Superior Court for \$440 was *affirmed*. It was held that, "the plaintiff, an inexperienced employee, being put to work with machinery that was deficient and therefore unsafe, and by reason of his inexperience not knowing of the danger which he incurred on account of the deficiency, he was entitled to recover for a personal injury which resulted in a large part, if not wholly, from the use of such unsafe machinery."

**ATLANTA COTTON FACTORY COMPANY v.  
SPEER (BY NEXT FRIEND).**

*Supreme Court, Georgia, January, 1883.*

[Reported in 69 Ga. 137.]

- CORPORATION — PRINCIPAL AND AGENT — MANAGER — MINOR EMPLOYEE INJURED — FALLING THROUGH ELEVATOR OPERATING. — 1. A corporation acts only through its agents, and unless responsible for their acts is wholly irresponsible. The agent who represents the corporation as master over other employees for the time occupies the position of the corporation for such time as to such subordinates. The corporation is bound to appoint a skilled and prudent manager to such position, and is negligent if it employs an imprudent or incompetent person; and if, from the negligence of this *quasi* master, unmixed with negligence of his own another servant or employee is injured, the corporation will be responsible. (r)
2. Especially was this the case where the injured employee was a child without access to the president or general superintendent, and who received her orders solely from the manager of the branch of the business in which she was engaged.
- (a.) It makes no difference that such subordinate manager violated the orders of his superior officer in placing the employee in a position of danger; nor does it matter that at the time the entire factory where the injury occurred was under the general supervision of a watchman, and that he had an altercation with the subordinate manager under whom the class of employees to which plaintiff belonged were at work, in regard to putting them in the room, in emerging from which plaintiff was injured. The watchman and the subordinate manager having settled their differences, and the employees having been put in the room, any negligence in so doing was imputable to the corporation, not to the plaintiff.
3. The court having submitted the question of negligence to the jury, including all the circumstances surrounding the injury, the age of the plaintiff, her ignorance of her danger, the length of time she had been connected with the factory, and the question of contributory negligence, and the jury having found for the plaintiff, we cannot say that there was error either in the instructions of the judge or in the verdict.

CRAWFORD, J., dissented.

(*Syllabus to official report.*)

1. *Employee injured in elevator — Fall of truck — Hole in elevator.* — BRUNNER v. BLACK, 92 Ga. 497 (1893), was an action by plaintiff, an employee of defendant, for damages for injuries sustained because of the negligent leaving of a hole in the floor of an elevator and improper management in running the elevator. It appeared that plaintiff, under the direction of another employee, got upon the elevator with a truck load of

flour in sacks, to be lowered to the ground floor of the building. The wheel of the truck slipped and the truck fell upon the plaintiff and knocked him backwards, and his foot was caught between the floor and elevator and injured. On the trial in the City Court of Atlanta there was verdict and judgment for plaintiff for \$50 which, on appeal, was affirmed.

APPEAL from judgment for plaintiff in the City Court of Atlanta.  
*Judgment affirmed.*

Hester Speer, by her mother as next friend, brought suit against the Atlanta Cotton Factory Company to recover for an injury received by her by falling through an opening prepared by the company for an elevator. On the trial, the evidence showed, in brief, the following facts:

The factory was under the general management of a superintendent named Harris. Each department under him was in charge of a "boss," and in each room there were two overseers, one of whom had charge during the day, the other during the hours of labor at night. Cobb was the night overseer of the spinning room at the time of the accident, and as such had control of the operatives in the spinning room during the hours of labor at night. Plaintiff was one of these operatives. The superintendent did not communicate directly with the subordinate employees. The factory ran day and night, except Saturday nights, when it suspended work at three o'clock on Sunday morning, and remained inactive until Monday morning. After work ceased at night, the night watchman was in charge of the factory. On Sunday morning, April 4, 1880, the operatives in the spinning room ceased work about the usual time. Most of them went home as usual, but there were some children who were afraid to return home before daylight. Among these was the plaintiff, who was about fifteen years of age. They were conducted to a basement room where the employees were in the habit of taking coffee at night. The general instructions of the superintendent to the night watchman were that no employee should be allowed to remain in any part of the factory, except this basement room, after the suspension of work on Sunday morning. Cobb went into the basement room, and, finding it damp and cold there, told Mattox the night watchman, to carry the children to what was known as the cloth room on the second floor. The watchman replied that it was against orders to allow them in the mill, and that the company would "be coming on" him; that he had to obey rules, and would not have anything to do with it. Cobb responded that he would take the responsibility, and thereupon conducted the children to the cloth room. The watchman did not actually forbid this, but replied as just stated. The cloth room was situated on the second floor, and was slightly separated from the main body of the factory, being

connected therewith by a passageway some sixteen or eight feet in length. On one side of this passage-way, and outside the direct line between the doors, the company was constructing an elevator, and for that purpose had opened a hole in the floor about six by eight feet in size. The carpenters employed by the company were engaged in other work, and only worked on the elevator at odd times, so that its progress was slow, and it had been under process of construction for a month or two before the accident. Ordinarily, a plank was placed in front of this hole to prevent accidents, but on this particular night the plank seems to have been omitted. There was some conflict in the testimony as to what Cobb said to the girls on putting them in the cloth room. He testified that he told them to go in and lie down on the burlap which was there, and not to play about the room at all or leave the room, and that he closed the door when going out; and this was corroborated by two or three witnesses for the defence, as to telling them not to go out of the room while the plaintiff and another witness testified that Cobb told the girls could go in the cloth room and play, lie down, sleep or do as they liked, provided they did not get on the white cloth. Plaintiff stated that Cobb did not close the door. A boy placing the girls in the room, Cobb went home. There was light in the cloth room, but none in the passage. Plaintiff never been in the cloth room before, and did not know of the hole. After Cobb's departure, the children began to play hide and seek, and plaintiff, going out into the passage for the purpose of seeking a better hiding place, fell into the hole for the elevator and was seriously injured. The superintendent was sent for, and, arriving in about a half an hour, sent plaintiff home, accompanied by a doctor.

There was some testimony on behalf of plaintiff to effect that the superintendent said he had previously told the president that if the place was not fixed some one would get through. This was denied by the superintendent, who also stated that after the operatives ceased work on Saturday night, Cobb had no authority to let them go over the factory, and that no one had any business in the cloth room, except those who were connected therewith; he admitted having carried some of the children into the cloth room one night and allowed them to sit on the rolls of burlap, but he did not think that Cobb was present or that he had mentioned the fact to Cobb.

There was some other testimony in regard to the extent of the injury, etc., not material here.

The jury found for the plaintiff three thousand dollars. Defendant moved for a new trial on the following grounds:

1. Because the verdict is contrary to law.
2. Because the verdict is contrary to evidence.
3. Because the court erred in charging the jury as set out in the third subdivision of the charge of the court.
4. Because the court erred in charging the jury as set out in the fourth subdivision of the charge.
5. Because the court erred in charging the jury as set out in the fifth subdivision of the charge.
6. Because the court erred in charging the jury as set out in the sixth subdivision of the charge.
7. Because the court erred in charging the jury as set out in the seventh subdivision of the charge.
8. Because the court erred in charging the jury as set out in the eighth and ninth subdivisions of the charge.
9. Because the court erred in charging the jury as set out in the tenth, eleventh, twelfth and thirteenth subdivisions of the charge.
10. Because the court erred in charging the jury as set out in the fourteenth and fifteenth subdivisions of the charge.

(Those portions of the charge excepted to are set out below.)

11. Because the court refused to charge the jury, as requested by defendant in writing, before the charge began, " If you find from the evidence that after the factory stopped work on Saturday night, Cobb's authority ceased, and on the Saturday night that plaintiff was hurt, if you find from the evidence that the factory stopped work and Cobb's authority had ceased, and the plaintiff, with other girls, had gone to the room in the basement, where defendant allowed them to stay, and that Cobb went to that room, and, in violation of the orders of defendant, invited or carried the plaintiff and other girls to the cloth room and left them there, telling them to remain there, and the plaintiff, while playing, went out of that room into a passage and fell into the hole made for the elevator, then I charge you that she would not be entitled to recover in this case, even if you further find that the defendant was negligent in leaving the hole there."

12. Because the court refused to charge, " If you find from the evidence that plaintiff had no business in the cloth room, or

in the passage where the elevator hole was, and that Cobb had no authority, under the rules of the defendant, to carry her there, then in the eye of the law she would be a trespasser, and cannot recover in this case, even if you should find that the defendant was negligent."

13. Because the court refused to charge, " If you find from the evidence that by the use of ordinary care the plaintiff could have avoided the injury, then she cannot recover in this case. Ordinary care is that care which prudent men exercise in their own affairs."

14. Because the court refused to charge, " If you find from the evidence that the plaintiff by any negligence contributed to the injury, then she cannot recover, even if you find that the defendant was negligent."

15. Because the court refused to charge, " Negligence is a question of fact for you to determine; you will look to all the evidence, and if you find that Cobb put the plaintiff in a safe room, well lighted, and told her to remain until daylight, and after he had gone she went out of the room into a dark passage and fell into the hole, then you are to decide whether this was negligence in her and whether it contributed to her falling into the hole."

16. Because the court refused to charge, " If you find from the evidence that Harris, the superintendent, gave orders to keep the hole protected, and some co-employee, without the knowledge of defendant, and against its orders, removed the protection, and this caused the plaintiff to be injured, the plaintiff cannot recover."

17. Because the court refused to charge, " If you find that the defendant issued orders which would have prevented plaintiff from being injured if they had been obeyed, and that the plaintiff, or other co-employees, disobeyed their orders and then the plaintiff was injured, she would not be entitled to recover, even if the defendant was negligent in leaving the hole unguarded."

18. Because the court refused to charge, " The rules which govern in the case of mere children do not apply to minors who have attained to years of discretion. Such minors are responsible for their failure to use the ordinary degree of care. It is for you to determine from the evidence as to her age and intelligence, whether or not the plaintiff was a mere child and not responsible for her conduct, or whether she was old enough and of sufficient

intelligence to be responsible for her negligence. Do you find that she was old enough and intelligent enough to know that she ought not to have left that room where Cobb put her, telling her to remain there, and that she ought not to have gone into a dark passage with which she was not familiar?"

The subdivisions of the charge which were excepted to are as follows:

[Subdivision 3.] "But upon the supposition that you might find in favor of the plaintiff some damages, and not by way of expressing or intimating to you an opinion that you ought to find any damages, I will charge you upon the measure of damages in this case. You should come to the conclusion under the principles of law I give you in charge, applying the evidence to them, that she is entitled to recover. In the first place, if the injury is a permanent one, she is entitled to recover as much damage in money as you may think under the law and evidence she is entitled to. You have heard the physicians testify, and from that, and all other evidence in the case applicable to it, you may make up your minds as to what amount would be reasonable and just. There is no way of arriving at that sort of damage, gentlemen of the jury, by measuring it in dollars and cents. It is, as the attorneys have told you, an injury to the manhood or womanhood of the plaintiff, which renders her less able to enjoy life in all its respects. You must judge for yourselves, under the evidence, what that is, and for that you must fix upon some amount, provided that you believe that the injury exists now, and that it will, in all probability, forever exist — that is, that it will affect her, more or less, all her life. If you should believe, gentlemen of the jury, upon the other hand, that the injury is not of such a permanent character, but that it has existed and yet exists, why then you would not be authorized to find damages, except as to the extent which the evidence satisfies your minds the injury is, and the length of time it has and will exist. There is, as I said to you, no way of measuring such damages in dollars and cents. It is left to the enlightened conscience of an impartial jury, taking care to be just and reasonable, and not excessive or oppressive."

[4.] "Another element of damage is the pain and suffering that she has endured, if you believe, from the evidence that she has endured pain and suffering. That also is not to be measured in dollars and cents, but is left to your enlightened conscience as

impartial jurors with the same qualifications I gave you before. You have a right also, gentlemen of the jury, to allow damages, if you see fit, for any further pain or suffering which the evidence satisfies your minds that the plaintiff, from her condition, must inevitably suffer, as, for instance, if you believe that she suffered pain at first, and that she suffers it now, and that from the nature of the injury she must continue to suffer it as long as she lives, you may add whatever you think is right to your verdict."

[5.] " So these are the three elements; the permanent injury or the loss to her of her enjoyments of life or capacity to enjoy life in any respect, or in every respect, as the evidence may satisfy your minds; the pain and suffering which she has suffered, and suffers up to now, if the evidence satisfies your minds of both of these facts; and the pain and suffering which she will probably suffer, if you are satisfied of that from the nature of the injury and the evidence in the case."

[6.] " But as I said to you, whether or not she will recover anything at your hands will depend upon the principles of law which are applicable to this case, and which principles of law I will give you in charge, and to which you will apply the evidence. The principles of law are divided (that is, according to my conception of the case) into two kinds: first, in reference to the liability of the defendant to any one who may have been injured; and, secondly, to the liability of the plaintiff to this defendant (?) as one of its employees."

[7.] " In the first ground, if you believe from the evidence that the defendant had in the factory a place of danger; if you believe there was an elevator hole through which anybody might have fallen, and that it was not sufficiently protected, or not protected at all, at the time this injury occurred, then the defendant would be liable to any one who was lawfully in that house, and who should fall through that hole, and should not, from the evidence, have prevented the falling by the exercise of due caution, or, as the law properly expresses it, ordinary care and caution."

[8.] " The next, as I said, is in reference to this defendant's liability to this plaintiff as one of its employees. To make you understand more fully the nature of this relation, I should state that in the first place this defendant is a corporate body, and that it can only do and commit acts through its officers and agents. Whoever the evidence satisfies your minds was in charge

of the whole factory, he was the first officer thereof; he was the commanding officer and superior to all other persons, whether other officers or laborers. He stands in the place of the corporation, and under him are all other grades, whether they come, or were, first, second or third to him, and that the evidence satisfies your minds were in authority there."

[9.] " Well, in reference to this particular case, if you believe from the evidence that the plaintiff was one of the employees of that factory, and that Mr. Cobb (I believe is his name) was present, was in command over her and commanded her, and he himself was a subordinate officer of the highest officer in charge of the factory; and that it was the custom of the factory, recognized by the highest officer in charge of the factory, to allow these children or minor employees to remain all Saturday night until morning, and that Mr. Cobb took these children, for their better protection, up into another part of the factory and left them there until daylight, and that while they were so left there, that this plaintiff was one who was left there, and that she fell through the elevator hole; if you believe from the evidence there was such a one there, and that she could not have prevented that by the exercise of ordinary care and caution, then the defendant would be liable to her for whatever damages she has sustained, provided always, that you should believe, for this is for you alone to consider, that having this elevator hole there was an act of negligence on the part of defendant."

[10.] " Negligence under our law is a question of fact for the determination of the jury. If you do not believe that this elevator hole was an act of negligence, or rather leaving of it in the condition which the evidence satisfies your minds it was in, was an act of negligence, why then you cannot find for the plaintiff."

[11.] " Because you must believe, in order to make the defendant liable, that it has been guilty of an act of negligence, and in the second place, that the plaintiff is only entitled to recover because she has been injured by reason of the act of negligence upon the part of the defendant, which she could not have avoided by ordinary care and caution, or which she did not contribute to by her own negligence."

[12.] " Now, upon this point I charge you, if she could have avoided it by ordinary care and caution, and fell, she could not recover, or, as I have charged you, that if she contributed to it by her own negligence, she could not recover. Upon the point

of contributing, like all others, it is a question of fact for you to consider whether she contributed to this negligence, and was guilty of any act of contributory negligence which caused her fall; whether she did that or not, you must look at it from the circumstances of the case. You must look at her age, you must look to her sex, you must look to the condition of her employment and the necessity of her remaining there during the night."

[13.] "I say you must take everything of the nature under the evidence into consideration, because they make one of the principal elements of the case for your consideration by which you are to test, or in part to test, having reference to all the evidence, whether she was guilty of contributory negligence. As to her age, if the evidence satisfies your mind that she was a minor, and if a minor, how old, then see if, under the circumstances in which she was situated, you will charge her with having contributed by her own negligence to this act. If you do, why she cannot recover under the rules of law. If you do not, why then she can recover such damages as you may choose to allow her under the rules of law I have given you in charge."

[14.] "The defendant invokes the rule of law that there can be no recovery of a master for an injury that may have been caused to an employee by a co-employee. This is the general rule, but there are some exceptions to it. One is, where a co-employee is in the master's place, so as to have the right to command the employees under him, and he does so command in a matter connected with the master's business, and an employee thus commanded obeys, and in that obedience an injury follows. Another is of a co-employee, by whose negligence the injury occurred, and who is engaged in the running of machinery; for instance, the person, whoever he may have been, that had in charge the running of the elevator and the protection from it of other persons; you will have to refer to these two exceptions."

[15.] "I have stated to you in order to arrive at your conclusions from the evidence as to whether the injury that occurred to this plaintiff and caused by the negligence of a co-employee, who comes within these exceptions; if not within these exceptions, and the plaintiff here had arrived at the years of discretion, so that in the minds of the jury she would be responsible for her acts as other persons would be, the jury would have to treat her as being under the general rule of employees and co-employees, and could not find for her."

The motion was overruled and defendant excepted.

HOPKINS & GLENN, for plaintiff in error.

HOKE SMITH, for defendant in error.

**Jackson, Ch. J.** — The controlling question made in this case is, whether a minor girl, just fifteen, can recover from a manufacturing company damages for a fall through an unprotected hole made for an elevator during its construction, when she was left Sunday morning at three o'clock in an unlocked room within five feet of the elevator, by orders of the boss over the room where she and other girls worked, it being the custom of the company to keep the girls at work Sunday morning to that hour, and to allow them to remain in the factory until daylight to go home.

The charge of the court below and the refusals to charge make this question when analyzed and applied to the facts of the case. It becomes, therefore, wholly unnecessary to consider in detail all the segments into which the charge is cut, from beginning to end, in the hope seemingly to find some rotten wood somewhere in the block, or to consider each of the various requests to charge spread out apparently like a net to catch something.

As a whole, the charge and refusals to charge, or modifications of the requests asked, give the law of the case correctly to the jury, and the facts sustain the verdict they have rendered, in the opinion of a majority of the court.

1. A corporation acts only through agents, and unless responsible for their acts is wholly irresponsible. The agent who represents the corporation as master over other employees for the time is in the shoes of the corporation, and whether they fit him, and he wears them with propriety or not, is their concern, for the reason that the corporation employs him, and puts others under him as a skilled and prudent manager. It is negligent if it fails to employ such a one, because those others under him must be subject to his orders and obey his directions, or the great purpose and end of their creation, to wit, organized and systematic labor and its fruits, are at an end. If, from the negligence of this *quasi-master*, this *locum tenens* unmixed with negligence of his own, another servant or employee of the corporation is hurt, it must logically follow that the corporation is responsible, or it can be held responsible for no carelessness at all. From the president and general superintendent down to the smallest child who labors day or night, all the servants of this creature of the

law, this impersonal entity, are co-employees, differing only in the character of their work and the amount paid them for it. If no co-employee can recover for the negligence of another, it must follow that no servant of a corporation can recover from it, no matter what it does, for it does nothing except by an employee. It would be thus to except corporations from the rule that a master is responsible to his employee for torts and careless and reckless disregard of life and limb. It would be to endow the artificial person with powers which no natural person can possess, and to grant that artificial creature immunites which no one of its creators can enjoy himself. It is not sound sense or good policy. It cannot be good law.

2. But when these minor servants of the grand head, the corporation, are children, who can have no access to the great managers, who can receive no instructions from them, but who look alone and must look alone to him under whom they particularly work, and from whose lips alone the orders and behests of the corporation ever reach their ears, it seems to us simply monstrous to hold that for the wrongs and negligence of these lords of theirs they cannot recover, because their lesser lords violated orders which superior magnates had given to them.

It makes no difference, therefore, in this case, whether Cobb, the man under whom they worked that night, violated his superior's orders or not. The children looked to him. Him they must obey or lose their places. Nor does it vary the question that, after working hours were over, another servant of the corporation, a watchman, had charge generally of the factory, and that he and Cobb had some altercation about the latter's putting the girls in that room. They were put in there by the person to whom they were accountable. Besides, the watchman yielded to Cobb and permitted them to be taken to the cloth room, and when the matter thus terminated between the superiors, is it right to lay blame upon the children? The reason and sense of the matter, it strikes us, is to lay the blame of their going to the room to Cobb, their special overseer, with the final acquiescence of the watchman, rather than to the children. It is law, too, as we understand it. The whole reason on which the liability of the master for injury to his servant for carelessness of a co-employee who rules for the time rests, is that the master was negligent in employing an incompetent agent. The negligence must be traced to the master and put on him; and it

is put on him when he is careless in selecting subordinates who are intrusted with the care of others. If the rule of the company was to keep the children in the basement, and Cobb did not obey it, he was unfit for his trust when the watchman reminded him of that rule; if the watchman was clothed with power to rule Cobb, and he did not do it, but surrendered his authority, and yielded to Cobb in violating the rule, he was incompetent. So that in either event, the negligence finds its source at last in the want of careful selection in the appointing power of the corporation, its president or superintendent, which is always that negligence which binds the master in case an employee is hurt by another employee who is his superior over any branch of business.

3. Nor does it matter, we think, that the children played in the room at hide and seek, and the plaintiff stepped out of the door to hide behind it, and fell in the hole. It was a natural supposition that they would while away the remaining hour or two before day. It was gross negligence in those who put them in the room not to warn them of the pit-fall just out of the door. It was equal negligence to leave such a hole with nothing around it to protect unwary feet from an awful fall. The court left that question of negligence, under all the facts and circumstances, to the jury, having regard in respect to contributroy negligence on the part of the plaintiff, to her age, her entire ignorance of her danger, the short time (only two weeks) in which she had been connected with the factory, and we cannot say that in so leaving it there was error, as negligence is always a question for the jury; nor can we say that the finding of the jury is not supported by sufficient proof to uphold it.

Whilst wise policy will beckon to this State all capital which may seek investment in manufacturing industries of all sorts, and should encourage its co-operative force in granting liberal corporate powers, privileges and immunities, yet the sound limbs and lives of the children of the State must not be left unprotected. If, in greediness for gain, the sanctity of the Sabbath be violated by keeping them at labor until three o'clock Sunday morning, an hour too late and dark for young girls to go immediately to their homes, according to the judgment and custom of this company itself, and if, in consequence of impracticability of their then leaving for home, they be permitted to remain until the broad light of the Lord's day shine on their way, the corporation must see to it that the agents, whom it employs to protect and

guard them, be careful to make them safe while within its cartilage, else it were better that the girls risk the rough and dark streets without, than the deeper and ruder holes within the walls of the factory.

Judgment affirmed.

SPEER, J., concurred, but furnished no written opinion.

CRAWFORD, J., dissented in a separate opinion.

## WHATLEY v. BLOCK.

*Supreme Court, Georgia, October Term, 1894.*

[Reported in 95 Ga. 15.]

**EMPLOYEE FALLING DOWN ELEVATOR SHAFT — BURDEN OF PROOF — NONSUIT.** — Irrespective of the question whether the plaintiff might or might not, by the exercise of ordinary care, have avoided falling into the elevator shaft, inasmuch as the evidence failed to show that there was any negligence on the part of the defendant, the judgment of nonsuit was right (1).

(*Syllabus by the court.*)

APPEAL from City Court of Atlanta. *Judgment affirmed.*

R. J. JORDAN, for plaintiff.

P. L. MYNATT & SON, for defendant.

**Simmons, Ch. J.** — This was an action by a servant against a master for personal injuries received in the course of his employment. The declaration alleged various acts of negligence on the part of the master. As this is not a case against a railroad company, the general law governing master and servant applies, and the presumptions are all in favor of the master, and the burden of overcoming them by evidence is upon the plaintiff. In this class of cases the master is not liable to the servant for the negligence of a co-servant unless it be shown that the master employed

1. In *SCHMIDT v. BLOCK*, 76 Ga. 823 (1886), it was held that: "While the original declaration in this case was confused and not as plain and distinct as the law requires, yet the amendment does set up clearly two causes of action, in that it alleges both improper and negligent rules by defendant for working the elevator where the injury sued for occurred, and the defective ma-

chinery of the elevator itself, as a negligent act of his, and ignorance thereof by the plaintiff, as the cause of the injury." Judgment on demurrer *reversed*. Schmidt brought suit against Block, his employer, for injuries sustained by the fall of a barrel of syrup or molasses caused by negligent and premature starting of elevator in defendant's factory.

such co-servant with knowledge that he was careless or incompetent, or retained him in the service after his unfitness was discovered. No allegation that the master was at fault in this respect is made in the declaration. We have carefully read the evidence in the record, and in our opinion the plaintiff totally failed to establish by his evidence any of the allegations of negligence made in the declaration. There was some evidence of negligence on the part of a co-employee in moving the elevator without notice to the plaintiff, but this we have shown is not imputable to the master. As to the absence of a railing around the hole in the floor through which the elevator passed, there was no evidence that such a railing was necessary in order to perform the work with safety. No general rule or custom in regard to placing such railings around other elevators of the same class was shown, so as to charge the master with notice that it was proper and necessary to do so. "A custom with reference to the adoption of certain safeguards in a given business must be so general that it is presumed that the defendant had knowledge of it, in order to make him liable for neglecting to provide the same." 14 Am. & Eng. Encyc. of Law, pp. 903, 904. Besides, if the absence of a railing rendered the work dangerous, the servant knew it as well as the master; and it is an established principle of law that the servant takes upon himself the hazard of all known dangers connected with the service. Of course if by want of ordinary care he fell into the hole, knowing it was there, he could not recover. The evidence failed to show that the master was guilty of negligence in not promulgating rules for the government or running of the elevator. It was not shown that such rules were necessary, or if necessary, what were the proper rules for this purpose; nor was it shown that there was a general custom on the part of other persons owning elevators to promulgate rules for their government. After a careful consideration of the case, we are forced to the conclusion that the court was right in awarding a nonsuit.

Judgment affirmed.

FALL OF LUMBER FROM TRUCK AND EMPLOYEE INJURED—FELLOW-SERVANT—ASSUMPTION OF RISK.—In HAZLEHURST v. THE BRUNSWICK LUMBER CO., 94 Ga. 535 (April, 1894). judgment of nonsuit in the Glynn Superior Court was *affirmed*, the facts of the case being as follows: Plaintiff

was employed by the defendant to drive a mule hitched by a rope to a truck used to haul lumber. While so engaged and (as he claimed) without fault on his part, the lumber fell from the truck against him, breaking his leg. He alleged that the truck was defective, inadequate and unsuited to the purpose, and that it was improperly loaded. It was eight feet long and three feet wide, and the lumber on it was thirty feet long and eight by ten inches in width and thickness. It was loaded five tiers high on the truck, which was too short to haul that length of timber. He had been employed in this work about three weeks. He did not know it was dangerous to haul lumber of that length and size on that length of truck. There were longer and wider trucks at the mill, but they could not be used on account of the lumber being piled so near the track. The usual length of lumber hauled on the trucks previously was twelve to fifteen feet. He had never hauled lumber as long as this. This was the second load of long lumber. He had nothing to do with the loading; four other hands were doing that. Both he and they were under the direction and control of a boss who was not present when this load was put on, nor when the injury occurred. One witness testified that defendant's trucks, though such as were commonly used in that section of the country, were not properly constructed or loaded; that trucks for hauling lumber should have a turn-table on them so that the load could be turned without turning the truck; that a load of lumber on any kind of truck should be bound down with a chain or rope to keep it from falling, etc. BROWN & WILLCOXSON appeared for plaintiff in error; GOODYEAR & KAY, for defendant in error. The decision (as per the official syllabus to the report) was as follows: "The evidence showing that the danger of the work in which the plaintiff was voluntarily engaged must have been as obvious to himself as to his employer; that there was no emergency requiring him to expose himself to the danger; and that, if free from fault himself, the negligence, if any, which resulted in his injury was that of a fellow-servant, he was not entitled to recover, and the court was right in granting a nonsuit. Judgment affirmed."

FALL OF PART OF MACHINERY — DEFECTIVE APPLIANCE — KNOWLEDGE OF DEFECT — MASTER NOT LIABLE.— In NELLING v. THE INDUSTRIAL MANUFACTURING CO., 78 Ga. 260 (*October Term, 1880*), judgment for defendant in the City Court of Richmond county was *affirmed*. Plaintiff's motion for new trial was made on ground of erroneous charge to jury, that verdict was against evidence, and as to impeaching verdict, etc.

The rulings of the court are stated in the official syllabus to the report as follows:

" 1. Jurors cannot impeach their verdict, and affidavits by members of the jury or of counsel as to their sayings after dispersing, cannot be received for that purpose.

" 2. Where a jury were considering a case late on Saturday evening, it was improper for the bailiff to inform them that court was about to adjourn, and that unless they made a verdict soon, they would be kept over until ten o'clock the following Monday morning; but where it appeared that this information was not given as coming from the court, and the affidavit, which was the only evidence of the fact, was not positive, but was made 'subject to correction;' and where the jurors must have known the lateness of the hour and the necessity of adjourning over Sunday; and where, at the same time, an envelope was given them in which to seal their verdict when reached; a new trial will not be required, although, in fact, the court had stated to counsel, in the absence of the jury, the probable necessity of an adjournment until Monday.

" 3. Where a servant is employed upon some work which, equally within the knowledge of the master and servant, is of a dangerous nature, the master is not liable for the consequences of an accident occurring to the servant in the course of that employment, unless there be negligence on the part of the master, and the absence of rashness on the part of the servant. A servant is bound to exercise his own skill and judgment, so as to protect himself in the course of his employment, and the master is not regarded generally as warranting his safety. He is himself bound to exercise proper care, and cannot claim indemnity from the master for an injury resulting to him which might have been prevented if he had himself been reasonably vigilant. [Citing Central R. R. Co. *v.* Haslett, 74 Ga. 59.] (a) The verdict in this case was not contrary to law or the evidence."

The NELLING case, *supra*, was an action by a mechanic against his employer for personal injuries sustained in removing and placing in proper position a machine on which he had been working out of doors and upon which he was about to work again when it had been removed into the house and was properly adjusted so as to be used. It fell when he was endeavoring to place staves under its legs so that the treadle by which it was run might have room to operate and parts of two of his fingers were cut off by the blade attached, as he alleged and proved, in consequence of the springs which kept it in place being too weak and old to hold it. He testified that he knew nothing of any defect in the machinery, and that the agent of

the company who was present when the removal took place and directed and superintended it gave him no information of the existence of any defect in the particulars named. The trial court charged the jury, at defendant's request, that "if the plaintiff was in charge of this machine for the purpose of managing it and working with it, it was his duty to discover any defect and report it to his superior, which if he failed to do, or if he did so, and continued to work with the machine, he cannot recover."

#### NOTES OF CASES ARISING OUT OF INJURIES SUSTAINED BY FALLING OBJECTS.

##### *Fall of masonry work.*

In *KEITH v. THE WALKER IRON & COAL Co.*, 81 Ga. 49 (1888), it was held that "a corporation building a structure composed in part of brick-work and in part of wood-work, is not responsible for the fall of the masonry upon the carpenter whereby he was killed, if due care was exercised in selecting the mason, and if there was no reason why he should not be fully trusted as an expert in his business, though his work proved defective, and the carpenter thereby lost his life; the two workmen being co-employees of a common master and co-operating in their respective departments of labor to a common end, to wit, the erection and completion of the contemplated structure." Judgment of nonsuit in the Dade Superior Court affirmed.

##### *Fall of shaft and pulleys.*

In *THE DARTMOUTH SPINNING COMPANY v. ACHORD*, 84 Ga. 14 (December, 1889), machinist in defendant's employ injured by fall of shaft and pulleys, judgment in the Richmond Superior Court was reversed. The syllabus to the official report states the case as follows: "A machinist employed by a corporation in its factory, not to use machinery, but to keep it in good order, and having knowledge that some of it is imperfect, and that employees cannot be relied upon to prevent it from becoming dangerous for lack of oil, takes the risk of discovering the condition of the machinery at the time he attempts to repair it, such risk being incident to his vocation. The incompetency or negligence of other employees, or of officers or agents of the corporation, resulting in putting the machinery out of order and rendering it dangerous, will not render the corporation liable for an injury which he sustains in handling the machinery whilst engaged without their assistance in repairing it."

##### *Fall of telegraph pole.*

In *WESTERN UNION TELEGRAPH CO. v. JENKINS*, 92 Ga. 398 (1893), the official syllabus states the case as follows: "The declaration set forth a cause of action against the telegraph company, the same alleging that the plaintiff's husband, an employee of the company, was killed without fault or negligence on his part and wholly by the fault and negligence of the company, the homicide being caused by the falling of a rotten pole which he had climbed in the performance of the duties of his employment and its defective condition being unknown to him. If the declaration was defective in matter of form in failing to allege

that the company's negligence consisted in keeping the pole in use, either with knowledge of its condition or negligently without knowledge, this was a matter for special demurser. The declaration being good in substance, the court did not err in overruling a general demurser thereto." Judgment in City Court of Richmond county was affirmed.

*Fall of wall upon employee.*

In *ALLEN v. THE AUGUSTA FACTORY*, 82 Ga. 76 (November, 1888), it was held that "it was not criminal negligence in a corporation not to give warning to the master machinist employed in their establishment that there was danger of fire in the gas-room, or that there was danger that the wall or walls would fall in case fire occurred, it not being alleged that he was ignorant of the danger or of the causes which produced it." Action for damages for death of plaintiff's husband, caused by fall of wall of gas-room while he was trying to break down door of room as ordered. Judgment for defendant in the Richmond Superior Court affirmed.

**BIBB MANUFACTURING COMPANY v. TAYLOR  
(BY NEXT FRIEND).**

*Supreme Court, Georgia, October Term, 1894.*

[Reported in 95 Ga. 615.]

**MINOR EMPLOYEE INJURED BY REVOLVING COG-WHEELS — WARNING OF DANGER — INSTRUCTING EMPLOYEE — ERRONEOUS CHARGE.** — 1. Where a part of a machine consisted of very rapidly revolving cog-wheels, the danger from which would be obvious even to a child of ordinary capacity, and an infant employee, who was such a child, had been repeatedly and distinctly warned of the danger and told that the cogs would cut off his finger or his hand if caught therein, it was not indispensable to the sufficiency of the warnings that it should have been further pointed out to the child exactly wherein the danger consisted, or explained to him how his hand would be injured by the operation of the cog-wheels (1).

1. *Minor employee injured by machinery — Knowledge of danger — Question for jury.* — In *WYNNE v. CONKLIN*, 86 Ga. 40 (1890), plaintiff's fingers injured by machinery, the syllabus by the court states the case as follows: "Whether the plaintiff, a boy of thirteen years, employed by the defendant to work in a tin shop, was of sufficient age and capacity to appreciate his hazard and provide against danger, is for the consideration of the jury; it appearing that, several times previous to the injury complained of, he had been put

to work on the machine which did the injury, that it was large and heavy, that a boy of his size and age was not able successfully to operate it, that boys in the shop were allowed, when not at work for the defendant, to use it in making things they desired, and that on the occasion of the injury the plaintiff had finished his work and in the presence of the foreman of the shop was cutting out a trinket for himself on the machine." Judgment of nonsuit reversed.

2. The court having charged to the effect that the warnings would not be sufficient unless they went to the extent which has been indicated in the preceding note, this was, in a case where the overwhelming preponderance of the evidence showed full diligence on the part of the defendant in all respects, such error as to require the granting of a new trial.

(*Syllabus by the court.*)

APPEAL from Bibb Superior Court. The case is stated in the opinion. *Judgment reversed.*

HARDEMAN, DAVIS & TURNER, for plaintiff in error.

RYALS & STONE, for defendant in error.

**Atkinson, J.** — The plaintiff as the next friend of his minor son, brought an action against the defendant for personal injuries alleged to have resulted to his son in consequence of the negligence of the defendant in failing to inform the child of the dangerous character of certain machinery about which he was put to work in the defendant's factory, in consequence of which failure to inform the boy of the dangerous character of the machinery, he was injured. The evidence was somewhat conflicting as to the age of the boy, though the greater weight of it seems to fix his age at about eight years. His father knew that he was to be employed, or was employed by the defendant in its factory; knew of the character of the business in and about which he was employed; and the testimony shows, though the minor himself stated to the contrary, that the child had been repeatedly advised by various employees of the defendant, including the assistant superintendent who was immediately in charge of the department in which the boy was employed, as to the danger attendant upon a negligent attention to his business connected with the machinery. It was shown that, notwithstanding these repeated warnings, the boy was accustomed, in his spirit of idle playfulness, to manipulate various cog-wheels connected with the machine. He was at work upon the machine, cleaning out trash that had accumulated in the cogs of the machine by which he was injured. The testimony of the minor's father who brings this suit, was to the effect that, while not especially bright, he was a child of ordinary intelligence and capacity. It appears that he was furnished with a stick and a piece of waste and instructed how to use them in getting the machinery cleaned. There was no evidence that he did not know of the dangerous character of the machine, or that he was not of sufficient capacity to have performed his work without injury, if he had been

attentive to his duties. The question in the case turned upon whether the master had exercised ordinary care in instructing the minor as to the uses of the machinery and the dangers incident to his employment in connection therewith. There was abundant evidence of the fact that he had been repeatedly advised that the machine was dangerous, and that he himself knew it; and under this state of facts, the court charged the jury, in effect, that the mere notifying him that the machine was dangerous by an employee would not be sufficient to relieve the defendant, unless that employee pointed out to him where the danger consisted — not simply to notice that what he was doing was dangerous. The vice of this instruction consists in the expression by the court to the jury of an opinion upon the weight of the evidence. The question of negligence is one for the jury exclusively, and the law does not undertake to point out how, nor in what manner, a master shall instruct a minor servant in the handling of dangerous machinery. If, as in this case, the danger be manifest and obvious, the jury might have found, had they been free so to do under the charge of the court, that no instruction at all was necessary, and if necessary, that the precautionary words of a co-employee were sufficient to apprise the boy of the danger to which he was then exposing himself, and in consequence of which he ultimately suffered injury. Whether such instruction would suffice, would depend to a very great degree upon the character of the machinery. If it were exceedingly intricate, invested with many latent dangers, a jury would probably find that a more detailed instruction were necessary than was given by the master to the servant in this case. But if it were a simple contrivance, easily understood, more general instructions might suffice to satisfy them. At all events, whenever the jury find that the master, with reference to this particular matter, has exercised ordinary and reasonable care, he is entitled to an acquittal. Upon all questions of fact involved they are the arbiters chosen of the law. The court has no more power to invade the province of the jury, than the jury has to entrench upon the prerogatives of the court. In view of the strong evidence submitted in behalf of the defendant in vindication of its diligence in the premises, we cannot say that this expression of opinion by the presiding judge was harmless; and even if we felt at liberty so to do, we are confronted by the positive enactment contained in section 3248 of the Code, enjoining upon this court the duty of

directing a new trial. We do not deem it necessary to consider in greater detail each of the many exceptions to rulings in this case.

Let the judgment of the court below be reversed.

## THE AUGUSTA FACTORY v. DAVIS.

*Supreme Court, Georgia, March Term, 1891.*

[Reported in 87 Ga. 648.]

- MINOR EMPLOYEE INJURED BY MACHINERY — PRACTICE — EXCEPTIONS — PARENT AND CHILD — DAMAGES — STATUTE.** — 1. There is no duty upon the judge of the Superior Court, after overruling a demurrer to the declaration, to suspend or postpone a trial of the case by the jury on issue of fact. The defendant may either except *pendente lite* to the judgment overruling the demurrer, or wait until after the trial is concluded and make that judgment a subject of exception in a regular bill of exceptions.
2. A father may recover damages against the wrongdoer for loss of labor and services of his minor child and for burial and other expenses incurred on account of the negligent homicide of the child, such child being old enough to perform labor and having lived for several days after the infliction of the injury resulting in death.
3. It would seem that the damages recoverable for loss of labor and services might be computed for the whole remnant of minority, though the mother of the child be living and might, under the act of October 27, 1887, have a right of action for the homicide, the father's action not being brought for the homicide, but for the loss of labor and services caused by the wrongful negligence of which death was one of the consequences (1).

(*Syllabus to official report.*)

1. In *DAVIS v. THE AUGUSTA FACTORY*, 92 Ga. 712 (1893), judgment of nonsuit in the City Court of Richmond county was *affirmed*, the official syllabus stating the case as follows: "It appearing from the plaintiff's evidence that the machinery of the defendant from which the plaintiff's daughter received injuries resulting in her death, though not of the latest, safest and most approved design, was, nevertheless, safe, when properly operated; and it not appearing that the defendant failed to give the deceased warning of the dangers incident to its operation (if, with reference to the character of this machinery, the age, capacity and experience of the deceased, and all the surrounding facts and circumstances, it was the duty of the defendant to give her such warning), the plaintiff was not entitled to recover, and there was no error in granting a nonsuit." [The court cited on the question of furnishing safe machinery, etc., Mich. Cent. R. Co. v. Smithson, 1 Am. & Eng. R. R. Cas. 104; note to Fisk v. Cent. Pac. R. Co., 1 Am. St. Rep. 28; see also 72 Cal. 38, 13 Am. Neg. Cas. 407; and Sullivan v. India Mfg. Co., 113 Mass. 398.]

APPEAL from judgment rendered in the Richmond Superior Court. *Judgment affirmed.*

J. B. CUMMING and BRYAN CUMMING, for plaintiff in error.

TWIGGS & VERDERY, for defendant in error.

**Bleckley, Ch. J.** — 1. After overruling the demurrer to the declaration, the judge, in the exercise of his discretion, and having doubts in his own mind of the correctness of his ruling on the demurrer, ordered the case to be withdrawn from the jury. This was done for the avowed purpose of giving the defendant an opportunity to bring the case to this court on writ of error in advance of a trial by jury on the issues of fact. Though it was in the power of the court to suspend the trial, there was no duty incumbent upon it to do so. The defendant might have entered exceptions *pendente lite* to the decision overruling the demurrer. *Bradley v. Saddler*, 54 Ga. 681. Or without exception *pendente lite*, the question on the demurrer alone could have been brought here by regular bill of exceptions after the trial was over and a recovery had by the plaintiff. *Lowe v. Burke*, 79 Ga. 164; and see *Kitchens v. The State*, 80 Ga. 810. Or after a mistrial. *Central R. Co. v. Denson*, 83 Ga. 267. But it was not necessary that the trial should proceed any further after the demurrer was overruled, in order to render the judgment on the demurrer reviewable here. *City Council of Augusta v. Lombard*, 86 Ga. 165.

2. The plaintiff's daughter was fifteen years of age, and was injured on the 8th day of January, 1890. She survived until the 24th day of the same month, when she died of her injuries. The action is for the loss of her labor and services, and for expenses incurred in her last illness, death and burial. The negligence of the defendant which caused the injury and consequent death was in furnishing unsafe machinery for the child to work with, she being in the employment of the defendant as a laborer in its cotton mill. This negligence was a tort and the death resulted from it. The plaintiff, according to all the better authorities, would be entitled to recover the necessary expenses incurred by him in consequence of it, and also compensation for the loss of the labor and services of his minor daughter from the time she was disabled by the injury until she died. 2 Thompson on Neg., 1272 and notes; 3 Lawson, Rights, Rem. & Pr., § 1016.

3. This action not being for the homicide of the daughter but for the tort of which the homicide was only a consequence, and the gist of the suit being the loss of labor and services, the right of action was altogether independent of the act of October 27, 1887, and the recovery would embrace damages for the loss of services of the daughter from the time of the injury until she would have been twenty-one years of age, according to the rulings of this court in *McDowell v. Georgia R. R.*, 60 Ga. 320. Inasmuch as one and the same tortious act may cause separate and distinct damage to two persons, as for instance to master and servant (*Smith on Master & Serv.*, \*173), it is not easy to see how the scope of the father's damage, as recognized prior to the act of 1887, would be contracted by the right of action given by that act to the mother, even where the conditions are such as to entitle the mother to sue and recover for the homicide. Her damages are arbitrarily measured by the statute at the full value of the life of the child, but this is not necessarily inconsistent with the duty on the part of the wrong-doer of compensating the father, on the basis of the prior law, for the damages sustained by him in the loss of the child's services up to the period of majority, in so far as those services would have been of value to him. The tort, with the homicide as an incident, might be treated as furnishing a cause of action to the father, and the homicide itself as furnishing a cause of action in behalf of the mother. In prescribing a measure of recovery for the latter, the legislature could make the value of the life the standard, without changing or intending to change the measure of recovery for the former. It does not appear, however, that the child now in question left any mother, nor was it needful that the declaration should disclose anything on that subject, the present action not being founded on the Act of 1887 but on the prior law. The contention that the prior law has been abrogated by implication is not sustainable, though it is doubtless true that a father when himself entitled to sue under the new act would have to elect between the remedy which it affords and the more restricted remedy afforded by the law as it stood before the act was passed. He could not sue severally for the homicide and for the original tort from which the homicide resulted, and recover in both actions.

Judgment affirmed.

MINOR EMPLOYEE'S HAND CAUGHT IN MACHINERY — PARENT AND CHILD — DAMAGES — PLEADING — RES GESTÆ — PHYSICIAN — WITNESS — DUTY OF MASTER TOWARD MINOR EMPLOYEE. — In **THE AUGUSTA FACTORY v. BARNES**, 72 Ga. 217 (*Supreme Court, Georgia, April, 1884*) in an action by a father for the fatal injuries to his minor daughter, fourteen years old, while working in defendant's factory, the injury being caused by the girl's hand being caught in machinery in the spinning room while cleaning the same, one of her fingers having to be amputated, but several weeks after the injury lockjaw (*tetanus*) set in, from the effects of which she died, judgment for plaintiff in the Richmond Superior Court for \$1,000 was affirmed. The official syllabus states the case as follows:

" 1. An action by a father for the loss of services resulting from injury to his minor child, caused by the negligence of the agent at a factory where she was employed, is not a case for vindictive or exemplary damages, and a charge to that effect was error; but the amount found by the verdict did not exceed the actual loss proved, and the error in the charge, having done no injury, will not require a new trial. [Citing *Cauthen v. Jones*, 41 Ga. 675, 680; *Central R. R. v. De Bray*, 71 Ga. 406.]

" 2. The test to determine whether a plea amounts to a justification, so as to give the defendant the right to open and conclude, is whether such plea sets up facts which could not have gone in evidence under the general issue.

" (a.) To an action by the father of a factory operative for an injury to his minor daughter, resulting from the negligence of the defendant's agents, a plea admitting that, on a day named, the daughter was employed by the company in its spinning room, and while so employed was injured, but denying that she was in the discharge and performance of her lawful duty, or that the company employed or continued to employ incompetent agents or officers, or that their acts were negligent, and asserting that, at the time of the injury the girl was acting in violation of her instructions and outside of the scope of her employment, and that the injury resulted from her own negligence, was not a plea of justification. [Citing *Ocean S. S. Co. v. Williams*, 69 Ga. 251.]

" 3. There was no error in refusing a nonsuit in this case. Whenever a *prima facie* case is made out, questions of fact should be left to the jury. [Citing *Cook v. Western & Atlantic R. R. Co.*, 69 Ga. 619; see also subsequent decision, *Cook v. Western & Atlantic R. R. Co.* 72 Ga. 48.]

" 4. In an action by a father against a factory company for injury

to his minor daughter, the defendant having pleaded and proved that the daughter received her semi-weekly wages from it; that they were always paid to her and never to the father, and that the rent of the house which the family occupied was paid from this source; and it being argued from this that she had been emancipated from his control, and that he had relinquished all right to her earnings, it was admissible to show, in rebuttal of this, that she regularly accounted for and paid to him her wages.

" 5. A young girl received a terrible and painful injury while employed in a factory, and subsequently died from it; about half an hour after the injury, upon the return of her father to his home on receiving information of the accident, she stated to him that they put her to work on some new frames; that she refused to go, and the second-hand cursed her and told her to go to work; that this frame was different from the old frame, and she did not want to run it; that they had to " duff " and stop the machinery to clean it off, and that the agent who directed the work at this frame started it without giving the usual signal. It was shown that she was injured while cleaning machinery, and that the person named as starting the machinery directed the work of the operators at that particular frame and gave the signal prior to starting. Held, that the statement was admissible as a part of the *res gestæ*.

" (a.) Where the competency of evidence is doubtful, it should go to the jury, that they may consider how far its force is impaired by surrounding incidents.

" (b.) The death of the person making the statements which form a part of the *res gestæ* is no ground for their exclusion from evidence. Code, § 3854, does not apply to such a case. [Citing also Code, § 3773; *Mullery v. Hamilton*, 71 Ga. 720; *Brady v. Parker*, 67 Ga. 636; *Burns v. State*, 61 Ga. 192; *Johnson v. State*, 65 Ga. 94; *McLean v. Clark*, 47 Ga. 24, 41, 42, 68; *Mitchum v. State*, 11 Ga. 615.]

" 6. What one physician stated to another as to the cause of the disease of which the girl died was hearsay and inadmissible; nor did it appear that the physician was inaccessible or incompetent as a witness.

" 7. In case of the injury of an adult by the negligence of a co-employee, where the injured servant used all ordinary care and diligence to avoid the injury from the principal's other servants with whom he was disconnected at the time, and where he was acting in obedience to the orders of another servant over him, whose orders he was bound to obey, this court has held that he had a right to recover for the injury inflicted. Where the injured employee is

a child of tender years, the master is bound to a higher degree of care. [Citing *Central R. R. & Banking Co. v. De Bray*, 71 Ga. 406.]

"(a.) Although an infant employee in a factory may not have been in the line of her duty at the time of an injury to her, yet if she was set to work on a particular frame, and what she did in cleaning the machinery was done under the direction of the superintendent of that work, and he did not forbid her engaging therein, he was bound to ordinary diligence in supervising her conduct, and if necessary to her protection, he not only might use coercion to restrain her from exposure and risk, but it was his duty to do so, and for neglecting his obligation in this respect his principal would be responsible. [Citing *Atlanta Cotton Factory Co. v. Speer*, 69 Ga. 137; *Scudder v. Woodbridge*, 1 Kelly (Ga.), 195; *Gorman v. Campbell*, 14 Ga. 137.]

"(b.) The Act of 1853 (Code, §§ 1885, 1886) does not lessen the obligation of the employer to look to the safety and protection of the minor operative, or interfere with the right of the parent to the earnings of his minor child, but affords another safeguard against the personal abuse of the minor by limiting the authority over him so far as it expresses, but no farther."

The opinion in the **BARNES** case (preceding paragraphs), was rendered by **HALL**, J., and the counsel in the case were **FRANK H. MILLER**, for plaintiff in error; **H. D. D. TWIGGS** and **SALEM DUTCHER**, for defendant.

The authorities on questions of negligence cited in the **BARNES** case, *supra*, will be found reported with the Georgia cases in this volume of **AM. NEG. CAS.**

**MINOR EMPLOYEE INJURED BY PLANING MACHINE — WARNING OF DANGER — MASTER LIABLE.** — In **MAY & CO. v. SMITH**, 92 Ga. 95 (1893), where plaintiff, a minor employee in defendant's service, was injured while raking shavings from under a planing machine at which he was at work, judgment for \$750 for plaintiff in the Fulton Superior Court was *affirmed*. The ruling by **BLECKLEY**, Ch. J., is stated in the official syllabus as follows:

"1. The rule that an inexperienced servant who is employed to work about dangerous machinery is entitled to warning of any special danger incident to the work, is not confined to the case of young children, but applies as well to a youth seventeen years of age who is inexperienced in dealing with a machine like that by which he is injured and is unacquainted with the details of its construction and mode of operation. That the machinery is not defective or out of repair but in perfect order, will not dispense

with warning where the danger is not open and obvious. Whether the master at the time of engaging the servant or afterwards ought to have inquired whether he was experienced or not, or should have taken notice, under all the facts, of the probability that he was not, nothing being said on the subject by either party, is a question for the jury." [Citing several authorities on the subject.]

**EMPLOYEE TRYING TO ADJUST BELT INJURED BY MACHINERY—PLEADING AND PRACTICE.**—In **COLLEY v. THE GATE CITY COFFIN COMPANY**, 92 Ga. 664 (1893), judgment of nonsuit in the City Court of Atlanta was *reversed*, on the grounds stated in the official syllabus as follows: "The action being by an employee against his employer for personal injuries alleged to have resulted from defective machinery and appliances which the employee was using in the line of his duty, the declaration is amendable, at the trial, by varying and amplifying the particulars in respect to which the machinery was defective and in respect to the manner in which the injuries were inflicted, the amendment evidently relating to the same occasion, the same occurrence, the same injuries and the same machinery referred to in the declaration. No new cause of action is introduced either with reference to the statute of limitations or any other rule of law. The amendment offered being good in substance and relevant, the court erred in rejecting it, and this error vitiated the trial and rendered nonsuit in which it resulted erroneous." Plaintiff was in defendant's employment engaged in curving sides of boxes, or for boxes, and discovered that the belt that ran the curve saw was off the pulley; the sand drum was run by the same shafting that ran the curving saw, and he had to adjust the belt from the tight pulley to the loose pulley in order to stop the shafting so that he could place the saw belt on the pulley; and while attempting to adjust the belt, the hanger was torn loose from the floor, striking him with great force, breaking his collar-bone, two ribs, etc.

**EMPLOYEE'S FINGERS INJURED BY COGS OF GEARING OF MACHINERY—KNOWLEDGE OF DANGER -- NONSUIT.**—In **STUBBS v. THE ATLANTA COTTON-SEED OIL MILLS**, 92 Ga. 495 (*March Term, 1893*), employee injured by machinery, judgment of nonsuit was *affirmed*, it being held (as per syllabus) that "Where the chief duty of an employee was to feed a mill, and an incidental duty embraced the cleaning up around it of material scattered in process of feeding, it was incumbent upon him to look

at the machine and observe every plain and constantly visible characteristic in its construction and working which rendered the necessary cleaning up dangerous. If, after working all day, he undertook to clean up at night, the omission of the employer to supply proper light for the occasion would not excuse the employee for exposing himself to unseen and unknown danger in the dark, which he ought to have discovered had he made proper use of daylight." The facts in the case were as follows:

"The plaintiff excepted to the grant of a nonsuit. He was injured while working at a machine (called the cake-breaker) in the defendant's mills. The alleged negligence of the defendant was, in allowing the cogs to remain exposed instead of replacing the boxes which originally covered them and which had been worn or broken off; and in failing to turn on the electric lights, whereby the plaintiff was compelled to work by the dim light of an oil lamp. It appeared from his testimony that he had for some years been working at the mills in sacking meal and as head pressman, but the day he was hurt was the first time he had worked at the cake-breaker. He commenced at seven o'clock in the morning, and was to quit at seven in the evening. When the machine was running fast, some of the cakes would bounce out of the hopper and fall over on the side, and in course of half a day would thus accumulate considerably and had to be cleaned up. It was while thus cleaning and picking up the cake on the back side of where the gearing was, that plaintiff in some way got his left hand too near to it, and two fingers were cut off by the cogs. This was about half-past five or six o'clock in the evening, and it was dark. He did not know anything about how it was until he was hurt; then he realized and saw that the thing was open. There was then no cap on it. He had never noticed it; did not know whether a cap belonged there or not; did not know anything about the machine; nobody came to show him anything about it. The place was not lighted up before he was hurt. There was only a little old lamp sitting away back on the opposite side of the machine from the gearing. The reason he continued to work when it was so dark was, he was thinking surely they would light up directly; he just kept looking for the electric lights to be turned on. They were fixed purposely to throw light on the machine on that side. Another witness testified, that there was a cap for that machine, but he did not know whether it was off or on; there was nothing to hinder one from seeing those cogs if the box was off; one could see the cogs if he looked for them; if he found out at all how the machinery ran, he would know they were already there. Witness supposed the cap was to keep the cake

from getting between the cogs, and to keep men out of danger, though they should see it. If a man did not know it was there and was not looking for it, and ran into it in the dark, that would be another thing," etc. \* \* \*

**DEFECTIVE MACHINERY — CONTRACT OF EMPLOYMENT — ASSUMPTION OF RISK. — THE FULTON BAG & COTTON MILLS v. WILSON**, 89 Ga. 318 (1892), was an action for personal injuries sustained from defendant's negligence in putting the plaintiff to work at defective machinery. At the trial in the City Court of Atlanta the jury found for the plaintiff \$250, and the defendant's motion for a new trial was overruled. The motion alleged that the verdict was contrary to law and evidence, and that the court erred in charging, in reference to the contract set up by the defendant, that "a servant cannot legally contract to excuse the master from the consequences of his (the master's) own negligence; and there is nothing in that contract which will bar the plaintiff's right to recover, if otherwise entitled to recover under the law and the facts as found by you." The official syllabus states the decision as follows:

"1. The rule that, as between employer and employee, the latter in the contract of hiring may assume all risks appertaining to the service, save such as arise from criminal negligence, was declared in the case of *Western & Atlantic R. R. v. Bishop*, 50 Ga. 465, decided by a full bench in 1872. This case was followed and applied in *Western & Atlantic R. R. v. Strong*, and *Hendricks v. Western & Atlantic R. R.*, 52 Ga. 461, 467. It was also recognized as authority, in 1876, in *Galloway v. Western & Atlantic R. R.*, 57 Ga. 512, and again in 1883, in *Cook v. Western & Atlantic R. R.*, 72 Ga. 48. The acquiescence of the legislature in the principle for so long a time is strong, if not decisive, evidence of the public policy of this State touching the question, more especially as legislative attention must have been called to the subject when the Act of 1876 (Code, § 4586b) was passed, which deals with criminal negligence of railroad employees, but forbears to interfere with the prior law as to other employees or as to employers generally. Under these circumstances this court, on a review of the above mentioned cases, declines to overrule them, but on the contrary affirms the same in so far as they are unmodified by the statute just cited touching railroad employees. The cases of *Ga. R. R. v. Beattie*, 66 Ga. 438, and *Ga. R. R. v. Gann*, 68 Ga. 350, relate to contracts, not between employer and employee, but between common carrier and consignor, and consequently do not overrule or in any way affect the cases now under review.

" 2. Construing the contract now in question in the light of the contract adjudicated upon in *Western & Atlantic R. R. v. Bishop*, 50 Ga. 465, the terms, "he further agrees that he will take upon himself all risks connected with or incident to the employment, and will in no case hold the company liable for any injury or damage to his person or otherwise he may sustain while thus employed, whether it arises from explosion, or the machinery, or accident, or the negligence or misconduct of himself or any other person employed by the company, or from any other cause," were intended by the parties to cover all negligence, including that of the employer in failing to keep the machinery in safe condition and in omitting to have it properly inspected to ascertain its condition. *Judgment reversed.*

**EMPLOYEE INJURED BY SAW MACHINE — DEFECTIVE APPLIANCE — MASTER LIABLE.** — In **THE WAYCROSS LUMBER CO. v. GUY**, 89 Ga. 148 (1892), judgment for plaintiff in the Ware Superior Court was *affirmed*, it being held that "though the evidence as to the cause of the injury was only circumstantial, it was sufficient to warrant the jury in finding that all of the material allegations in the plaintiff's petition were established." The plaintiff alleged that he was engaged at work at the mills operated by the defendant, his duty being to work at the Reppard roller and saw the lumber; the engine, boilers and propelling machinery being underneath the floor upon which the saws and carriages and other machinery connected more directly with the manufacturing of the lumber. While he was changing the saws, this being in the line of his duty, the saw carriage went forward towards him, and without any notice or warning from any one he was caught between the head-block and saw-guide, and injured. The machinery was under the charge of a machinist employed for the purpose by the manager or overseer of the business. Plaintiff at the time of the injury was entirely free from fault, and the accident resulted from a failure on the part of the overseer, machinist and agents of the defendant to exercise ordinary and reasonable care and diligence to prevent it. By reason of a defect in the machinery a valve was caused to move and gave steam to the propelling machinery which caused the carriage to move forward, catching plaintiff between the head-block and saw-guide, this defect in the machinery being known to the machinist and overseer of the mill, and unknown to plaintiff, who had been in the defendant's employment five days. The carriage by reason of the defect of the machinery had been caused to go forward on other occasions before his employment by the defendant, which fact was known to the manager, overseer and machinist, and

the defendant had failed to correct or repair the defect so as to prevent the giving of steam and the moving of the carriage without warning, and notwithstanding such failure to repair the defect, the manager, overseer and machinist failed to inform plaintiff of the same. All of said failures described were caused on account of unskilfulness and imprudent conduct on the part of the manager, overseer and machinist, without any degree of negligence on the part of plaintiff and constituted negligence on the part of defendant and were the sole cause of the injury. By amendment to the declaration it was alleged that the injury resulted solely from a defect in a valve which was improperly adjusted thus allowing steam to escape into the cylinder and caused the saw carriage to move forward, and that this defect was of long standing and was known to the general overseer or superintendent in general charge of the affairs of the defendant at the mill, and was also known to the defendant by reason of its long standing, and was not known to the plaintiff. On demurrer that portion of the declaration seeking a recovery on ground of negligence of a co-employee was stricken.

*Female employee injured by hand being caught in laundry machinery — Warning of danger — Nonsuit.*

In *HOYLE v. THE EXCELSIOR STEAM LAUNDRY COMPANY*, 95 Ga. 34 (*October Term, 1894*), where nonsuit was affirmed, it was held (as per syllabus by the court) that: "The plaintiff being an adult engaged in the work of cleansing a machine, an operation the danger of which was obvious without instructions from the master, there was no negligence in failing to give her warning of the danger; and it appearing from the evidence that by the exercise of ordinary care she might have avoided the injury she sustained, there was no error in granting a nonsuit."

*Employee injured by machinery — Negligence of fellow-servant.*

In *SMITH v. SIBLEY MANUFACTURING COMPANY*, 85 Ga. 333 (*April, 1890*), it was held that: "A servant injured by the negligence of a fellow-servant who had a 'propensity to start machines after they were stopped,' thereby nearly killing several of the servants on previous occasions (which propensity and its results were known to the master and to the injured servant), is not entitled to recover damages of the master, although the negligent one was retained in employment after the injury complained of." Judgment on demur-  
rer to plaintiff's declaration in the Richmond Superior Court affirmed. Plaintiff was operating a cotton-picker or cleaner, and

while cleaning it, the machine was started by a fellow-employee, and plaintiff's left hand was injured resulting in the loss of three of his fingers.

*Employee injured by machinery — Nonsuit.*

In *McGOVERN v. THE COLUMBUS MANUFACTURING CO.*, 80 Ga. 227 (*February, 1888*), where plaintiff while attending to one of defendant's cotton manufacturing machines, called a picker, was injured by his hand being caught in the machine which he was cleaning under the direction of another employee, judgment of nonsuit in the Muscogee Superior Court was *affirmed*, on the authority of Code, § 2202; *Henderson v. Walker*, 55 Ga. 481; *Western & Atlantic R. R. v. Adams*, 55 Ga. 281; *Crusselle v. Pugh*, 67 Ga. 430; *McDonald v. Eagle & Phenix Mfg. Co.*, 67 Ga. 761 and 68 Ga. 839, which cases are reported in this volume of *AM. NEG. CAS.*

## JACKSON v. STANDARD OIL COMPANY.

*Supreme Court, Georgia, August, 1896.*

[Reported in 98 Ga. 749.]

**DEATH OF PERSON IN AN ATTEMPT TO RESCUE EMPLOYEE FROM SUFFOCATION BY POISONOUS GAS IN OIL TANK — PERILOUS SITUATION — OIL COMPANY NOT LIABLE.** — 1. Loss of life incurred in rescuing another from a situation of peril gives rise to no cause of action against one who is guilty of no negligence, either as to the person whose safety was imperiled or as to the rescuer after his efforts to make the rescue had begun.

2. The portions of the charge excepted to contain nothing affording cause of complaint to the losing party; the requests to charge, so far as legal and pertinent, were covered by the general charge, which fully presented to the jury the issues of fact involved; and the evidence fully warranted the verdict.

[The foregoing paragraphs comprise the syllabus by the court in an action to recover damages for the death of plaintiff's husband who lost his life in an attempt to rescue an employee who was exposed to danger of suffocation from poisonous gas generated in a tank which he was cleaning for defendant company.]

FROM judgment for defendant in the City Court of Atlanta, plaintiff appeals. The facts appear in the opinion. *Judgment affirmed.*

GARRARD, MELDRIM & NEWMAN and R. M. HITCH, for plaintiff.

DENMARK, ADAMS & FREEMAN, for defendant.

Lumpkin, J.—1. The evidence in this case shows that the plaintiff's husband, Warren Jackson, lost his life in an attempt to rescue one William Mitchell, who was exposed to the danger of suffocation from poisonous gas generated in a large iron tank which he was engaged in cleaning as a servant of the Standard Oil Company. The action was brought against this company to recover the value of Jackson's life.

It plainly appears that Mitchell was, or ought to have been, fully aware of the danger attending this work, and that he had been instructed how to guard against it; and it also appears that the company was in no wise negligent relatively to Jackson. Indeed, it may be stated as a fair conclusion from the evidence that the company was altogether free from negligence as to both these parties. This being so, there is no present occasion for exploring the vast mine of law relating to the liability of one through whose negligence another is placed in peril to respond in damages to a third person who in good faith undertakes to rescue his fellow-being thus exposed to danger, and is injured or killed in the attempt. This case, upon its merits, turns upon the indisputable proposition that one who is guilty of no negligence at all cannot be made liable to anybody. This is so obviously true as not to require argument. We refer, however, to the case of *Donahoe v. Wabash, etc., R'y Co.*, 83 Mo. 560, which is directly in point; and we also make the following extract from 1 Shearm. & Redf. on Neg., § 85, which cites the above mentioned case: "No one is liable at all, unless he is in fault. Thus, a railroad company could not be made liable for injuries suffered by one who, with the most praiseworthy motives, ran in front of a train to rescue another who was unlawfully on the track, and of whose presence the engineer in charge had no notice, actual or constructive, the train being prudently managed. In such a case, neither party would be in fault, and therefore neither could recover damages."

2. For reasons rendered apparent by the above statement, we do not deal specifically with the numerous questions presented in the record, and which are referred to generally in the same headnote.

Judgment affirmed.

FEMALE EMPLOYEE FALLING INTO RESERVOIR CONTAINING LYE — EYESIGHT INJURED — MASTER NOT LIABLE. — In *NEFF & CO. v. BROOM*, 70 Ga. 256 (February, 1883), judgment for plaintiff in the Fulton Superior Court was reversed on the grounds set forth in the official syllabus to the report as follows:

" 1. In an action for damages by an employee against the master, the controlling question being whether there was negligence on the part of the master, if there was evidence from which the jury might have inferred its existence, this court will not reverse the ruling of the presiding judge in refusing a nonsuit and submitting the case to the jury.

" 2. A soap manufacturer conducted his business in a room about seventy-two feet in length and twenty-two feet in width. In the front portion of this room, the ceiling was fourteen feet high, and in that place benches or tables were located, on which the soap was put into wrappers. The plaintiff was employed to stand or sit at one of these tables, have soap and paper furnished her there, and put wrappers around the former. In the rear portion of the room, the ceiling was only six feet and two inches from the floor, and there were located the fixtures connected with the business, some of which projected through the low ceiling, and also kettles and reservoirs set into the floor. The paper used for wrapping was kept upstairs, and brought down as needed, and put upon the tables when called for. Women never had to go after it, nor had they any business in the rear portion of the room where the fixtures were. On one occasion, the paper had been removed from the tables to the rear of the room to prevent it being blown about by the wind. The plaintiff returned to her work at a time which was not within the ordinary working hours, and while the other hands were at dinner. She went into the rear portion of the room after paper, fell into a reservoir containing lye, impregnated with potash, and was injured. It was testified by servants who worked for the same master, after the accident, that wrapping paper was kept in different parts of the room, and some of it close to the reservoir. *Held*, that under these facts, there could be no recovery, there being no duty resting on the master which he violated."

## ELLINGTON (BY NEXT FRIEND) V. BEAVER DAM LUMBER COMPANY.

*Supreme Court, Georgia, October Term, 1893.*

[Reported in 93 Ga. 53.]

1. **LUMBER COMPANY OPERATING LOCOMOTIVES NOT LIABLE AS A RAILROAD COMPANY FOR INJURIES TO EMPLOYEES BY SUCH LOCOMOTIVES.** — Under the Constitution of this State, the superior courts have no authority to grant charters to railroad companies. A company to which a charter was granted by the Superior Court for the purpose of "carrying on the general business of sawing all kinds of lumber, by machinery run by steam, or such power as may be best adapted to the business; to place said lumber on market," etc., is not a railroad company, although, according to its charter, it had authority "to buy, lease, sell, use and operate locomotives and railroad engines on tramroads and railroads; to build, construct and project railroads and tramroads contiguous to, and in connection with, and for the purpose of furthering, facilitating and more readily and easily carrying on the aforesaid business of sawing, manufacturing, etc., as proposed." The fact that such company did, on some occasions, transport passengers and freight for hire, did not make it a railroad company as to one of its own employees who was injured by the movement of a locomotive at a time, and upon an occasion, when the company was in no sense engaged in transacting business as a carrier for the public.
2. **MANAGER OF VEHICLE AND TRACK REPAIRER ARE FELLOW SERVANTS.** — The manager of a vehicle used locally by a lumber company in the transportation of its supplies and products, and another servant of the company whose business it is to repair and keep in proper condition the track upon which the vehicle is run, and who, according to the custom of the company, is daily transported to and from his work on this vehicle, are fellow-servants, both being in the employment of the company, and the work of both, when regularly carried on, conducing to the accomplishment of a common object, to wit, the transportation of the company's supplies and products.
3. **STATUTE — COMMON LAW — RAILROAD LAWS NOT APPLICABLE TO LUMBER COMPANY — EMPLOYEE INJURED BY ACT OF ANOTHER EMPLOYEE — FELLOW-SERVANTS.** — The laws of this State applicable to actions by employees against railroad companies, as such are not applicable to an action against a lumber company of the kind above indicated, by one of its employees; but the general law applicable to an action for personal injuries by a servant against his master must control. This being so, and it appearing from the evidence that the plaintiff and the fireman, through whose alleged negligence the plaintiff was injured, were fellow-servants, the plaintiff was not entitled to recover, even if the negligence was established, and was the cause of the injury. Consequently, there was no error in granting a nonsuit.

(*Syllabus by the Court.*)

APPEAL from nonsuit in the Burke Superior Court. The case is stated in the opinion. *Judgment affirmed.*

BOYKIN WRIGHT and BERRIEN & MUNNERLYN, for plaintiff.

J. R. LAMAR, H. H. PERRY and JOHNSTON & BRINSON, for defendant.

**Lumpkin, J.**—1. The superior courts have no power, under the Constitution of this State, to grant charters to railroad companies. If, notwithstanding, a superior court should go through the form of incorporating a railroad company, and the alleged company transacted business as a common carrier in transporting freight and passengers, it may be that the persons composing it would be estopped from denying that it was a railroad company, and as such subject to the laws of this State with respect to the liability of railroad companies. It is quite obvious, however, that the Superior Court of Burke county, in granting a charter to the Beaver Dam Lumber Company, made no attempt whatever to incorporate it as a railroad company. The terms of the charter, as they appear in the record, show plainly enough that this company was incorporated to carry on the business of sawing and selling lumber of all kinds; and although it may have had authority to buy and operate engines on tramroads, and to build such roads, these powers were to be exercised only in connection with, and for the purpose of facilitating and more readily carrying on the lumber business itself; that is, they were merely incidental to the main object and purpose for which the company was created, and nowhere in the charter is any power granted to conduct a transportation business for the public, as would necessarily be done in the charter of a railroad company. The Beaver Dam Lumber Company was, therefore, not a railroad company; and so far, at least, as its own employees are concerned, this fact is not altered because on some occasions the company did transport passengers and freight for hire. Whatever its liabilities might be to those it served in this manner, it certainly was not liable as a railroad company to an employee for an injury occasioned to him by the movement of a locomotive at a time when the company was engaged strictly in the transaction of its legitimate business and in no sense operating as a carrier for the public.

2-3. For the purposes of this case, it is proper, then, to treat the locomotive as a mere ordinary vehicle, and the person in charge of it as its manager, just as if it were a wagon and that person were the driver or manager of the team by which the

wagon was drawn. The engineer, strictly speaking, was the servant of the company whose duty it was to manage the locomotive and control its movements, but the fireman's duty required him to be upon it also, and it was there his work was to be performed. He was a sort of assistant to the "driver."

The action was brought by Dennis Ellington, as next friend of his minor son, Joe Ellington. Regularly, Joe should have been the plaintiff, suing by Dennis as his next friend, but the difference is of no consequence. *Lasseter v. Simpson*, 78 Ga. 61; *Van Pelt v. C. R. & C. R. R. Co.*, 89 Ga. 706. For convenience, however, it will be understood that when the word "plaintiff" is hereinafter used, reference to Joe Ellington is intended. It was his business, in connection with others, to work upon and keep in order the track of the company's railroad over which it transported its own products and supplies, and the evidence shows that it was the custom of the company to daily transport its track-hands, including the plaintiff, upon the locomotive, to and from their work. The substance of the plaintiff's main contention is, that while he was in the act of getting upon the locomotive to be carried home at the close of a day's work, the fireman, by suddenly starting the locomotive, caused the injuries received by the plaintiff, who was free from fault, and this conduct of the fireman was negligent. Before proceeding to discuss the question of the company's liability upon the assumption that the above contention was sustained, it will be proper, perhaps, to state and dispose of another contention made on the brief of counsel for plaintiff in error, and insisted upon here, which was: that the negligence complained of, even though committed by the fireman, is imputable to the company itself, because the duty to supply the locomotive with a competent engineer devolved upon the company proper, and that as the fireman was inexperienced and incompetent, putting him in charge of the engine, whether done by the company or its representative, was the negligence of the company itself. We quote from the declaration all that is material upon this point: "That said company was further careless and negligent in that the said train was carelessly and negligently started, as aforesaid, by a person not the engineer of said train, and in the absence of the engineer from the place of his duty, the person so attempting to run said train being inexperienced and incompetent."

It will be observed there is no allegation that the company,

either by itself or by any representative, supplied the "inexperienced and incompetent" person to run the engine, or made it his duty to do so. The declaration simply states what he did, but does not state that he had any authority from the company, direct or indirect, for so doing. The plaintiff himself testified it was not the business of the fireman to run the engine, and that there was no reason for the engineer not to have done it, as he was there in the cab of the engine. It is, therefore, apparent that the contention of the plaintiff with which we are now dealing is not sustained either by his pleadings or by his proof.

We now return to the question whether the company is liable or not, granting that the plaintiff was free from fault, and that he was injured by the negligence of the fireman. The general rule of law that a master is not liable to a servant for an injury caused by the negligence of a fellow-servant is well settled. Section 2083 of the Code, for the reason therein stated, makes an exception to the rule, so far as railroad companies are concerned, and makes these companies liable, just as they are to passengers, to all "employees who cannot possibly control those who should exercise care and diligence in the running of trains, \* \* \* for injuries arising from the want of such care and diligence." The defendant in this case not being a railroad company, this section of the Code is not applicable, and, therefore, the only remaining question is, were the plaintiff and the fireman, under the peculiar facts of this case, fellow-servants?

The rule for determining who are fellow-servants is thus stated in Wood's Master and Servant, § 435: "The true test of fellow-service is community in that which is the test of service, which is subjection to control and direction by the same general master in the same common object; but unless they are subject to the same *general control*, the fact that they are engaged in the same common pursuit does not render them co-servants. *It is subjection to the same general control, coupled with an engagement in the common pursuit, that affords the test*, and unless the two elements concur there can be no common service, which disentitles an employee under the control of one master, from recovering for injuries received through the negligence of a servant under the control of another master." In the notes on page 855 to 857 of this work, numerous cases are cited affording illustrations as to who may be considered fellow-servants, among them *Whaalal v. M. R. & Lake Erie R. R. Co.*, 8 Ohio St. 249; *Indianapolis R.*

R. Co. *v.* Love, 10 Ind. 554; Indianapolis R. R. Co. *v.* Klein, 11 Ind. 38, in support of the proposition that where one servant was employed by a railroad company in making repairs to its tracks, and another as fireman on one of its trains, these were not such distinct departments of duty as to make any exception to the general rule constituting them fellow-servants. On pages 861-2, the author of this text-book has collected quite a comprehensive list of cases showing who are to be regarded as fellow-servants, including "conductor and track-layer," "engineer and laborer," and so on. On the latter page, instances to the contrary are also given, and authorities cited. In addition to the above authorities, the cases of Prather *v.* R. & D. R. R. Co., 80 Ga. 427, and White *v.* Kennon & Co., 83 Ga. 343, sustain the proposition that a track-hand who is carried to and from his work upon a train of his master is a fellow-servant of the engineer and fireman in charge of that train. The former case is not precisely in point, but it certainly bears in the direction indicated. The latter case very closely resembles the case at bar. The defendants were a firm operating a steam saw-mill, and in connection with it, used a tramroad extending some distance into the country, on which engines and truck cars were run for the purpose of hauling logs to the mill. The plaintiff was employed to take charge of a gang of hands and to keep the track of the tramroad in repair. On the occasion upon which he was injured, he was required to go out on a train with a load of ties and was riding on the ties, and while on the journey, the train ran into a bad place in the track, threw him from the car, and he was injured severely. In the opinion delivered by Justice Simmons it is stated that: "The law of this State concerning actions of this sort against railroad companies is not applicable to the present case, but it is controlled by the principles of the general law between master and servant;" and it was held that the plaintiff was not entitled to recover, for two reasons: first, because it was gross negligence on his part to ride over this defective track on top of a load of cross-ties; and second, because he and the engineer, of whose negligence he complained, were fellow-servants, and the defendants were not liable to the plaintiff for the negligence of his co-employees.

According to the evidence in the case at bar, it was in the line of the plaintiff's duty, and in conformity to the custom of the company, for him to be daily transported to and from his work

on the locomotive by which he was injured, he being employed in the capacity of track-hand. In our opinion, he and the fireman were fellow-servants, both being in the employment and under the general control of a common master, and the work of both, when regularly carried on, conducing to the accomplishment of the common object for which they were engaged by the company, viz: the transportation of its own supplies and products. According to the test laid down by Mr. Wood and other text-writers, and to the weight of current authority, which is in accord with previous decisions by this court, we think the conclusion that the plaintiff and the fireman were co-employees is inevitable.

In *Shields v. Yonge*, 15 Ga. 349, the second count in the declaration alleged that the plaintiff's son, who was killed, was employed on the train as a fireman, by contract with his father. In commenting on this count, Judge Benning, on page 357, said: "The second count differs from the first in this — that it alleges the said son and servant of the plaintiff to have been received by the superintendent, Wadley, as a *hireling*, to perform certain services about the cars, etc., for which the plaintiff was to be paid. It alleges that the injury, resulting in the death of the son, was brought about by the negligence of Wadley and his servants. Now, Wadley, in hiring the minor son, acted simply as agent for the State. He was the State's superintendent of the State's road. Wadley, and his servants, and this minor son, after his hiring, were, therefore, *all* fellow-servants of a common principal — the State. And this suit is, in effect, against that principal. Now, the question is, does an action lie against the principal, for an injury done to a servant by a fellow-servant, at a time when both servants are acting in the course of their common employment?" This, however, was carrying the doctrine of fellow-servants farther than this court has since been disposed to do. Indeed, in *Cooper v. Mullins*, 30 Ga. 146, some of the language used by Judge Stephens tends towards the other extreme; but the decision in that case, applied to its facts, does not go as far as the judge's reasoning would indicate. It appeared that the plaintiff, an engineer, who was not in the regular service of the W. & A. R. R., but an employee of the Georgia railroad, was injured while on a special mission in charge of a locomotive drawing a train of cars over the W. & A. R. R., because of the negligence of an employee on another train used in the regular

business of that road. These two persons were, we think, properly held not to be fellow-servants.

In Krogg *v.* A. & W. Pt. R. R. Co., 77 Ga., on page 214, Justice Blandford alludes to the "philosophic view" of this question taken by Judge Stephens in the Mullins case, and cites that case in connection with that of Bain *v.* Athens Foundry, etc., Works, 75 Ga. 718, 14 Am. Neg. Cas. 6, *ante*, to sustain the correctness of the proposition that a railroad engineer was not a fellow-servant of the general manager. And again, in Killian *v.* Augusta & Knoxville R. R. Co., 78 Ga., on page 751, Justice Hall refers approvingly to the *decision* in the Mullins case; but nothing in the cases just mentioned conflicts with what is ruled in the case at bar. In deciding them it was not necessary for this court to adopt all that was said in the opinion of Judge Stephens, nor do we think that it was intended to do so.

The case mainly relied on by counsel for plaintiff in error is that of Atlanta & Richmond Air-Line R'y Co. *v.* Ayers, 53 Ga. 12, in which it appeared that the plaintiff's deceased husband, who had been in the employment of the railroad company as a track-raiser, was killed in attempting to leave a gravel or construction train of the company which had stopped at the point where he and other hands were at work to take them to a depot a few miles distant, the negligence alleged being that the train was suddenly started before the deceased had time to safely disembark at the depot in question. In that case, however, this court did not really decide that the deceased and the employees of the company charged with the duty of running the train were not fellow-servants. The question was left open, as a close examination of Judge Tripp's opinion will show. Moreover the plaintiff's right to recover did not depend upon a decision of that question, and it was not necessarily in the case. It being a suit against a railroad company, it made no difference whether Ayers, the track-hand, was a fellow-servant of the employees on the train or not, because, under section 2083 of the Code, all employees except those who may be able to control those engaged in the running of trains are placed upon the footing of passengers as to injuries arising from the negligence of this latter class of employees, and there can be no doubt that the employees protected by this section include all who fall within the descriptive words, "cannot possibly control those who should exercise care and diligence in the running of trains," whether they may or

may not be properly classed as fellow-servants of the train employees. This being so, Ayers, by virtue of this section, was in either event given the right of a passenger, so far as the liability of the company was concerned, and accordingly it was held that his own negligence, even though contributing to his death, would not totally defeat the right of his widow to recover. In other words, this section put the class of employees to which Ayers belonged on the same legal footing with passengers, without any reference to the question of fellow-service.

In Georgia R. R. *v.* Goldwire, 56 Ga. 196, it was held that a railroad employee without fault could recover for injuries occasioned by the negligence of co-employees in the same service. This ruling was based largely upon the law contained in §§ 3033 and 3036 of the Code, but it was also strongly intimated that the plaintiff, a "train-hand" was an employee who could not "possibly control" the conductor and engineer, and that consequently he might recover under § 2083. Enough is there suggested to make it certain, if there can be any doubt about it, that a track-hand like Ayers could not possibly control employees running a train. After a careful study of the Ayers case, we are satisfied that, properly understood, it contains nothing out of harmony with what is ruled in the case at bar (1).

If a farmer should use a wagon to send his servants to a field to pick cotton, and to haul the cotton and the cotton-pickers home at night, and one of the latter should be injured because the driver of the wagon, or another servant who assisted him in managing or loading the wagon, negligently and carelessly started the team too suddenly, it would be clear enough that the farmer would not be liable for the injury. We have endeavored to show that the present case falls within the same class as that indicated by the above homely illustration, and if we have succeeded, our conclusion that the plaintiff was not entitled to recover must be correct. In this connection, see the remarks of Lord Abinger, C. B., (2) in the case of *Priestley v. Fowler*, 3 Mees. & W. 1, cited in McKinney on Fellow-Servants, § 4.

The granting of the nonsuit was right. Judgment affirmed.

1. *Shields v. Yonge*, 15 Ga. 349; *Cooper v. Mullins*, 30 Ga. 146; *Krogg v. A. & W. P. R. Co.*, 77 Ga. 214; *Bain v. Athens Foundry, etc., Works*, 75 Ga. 718; *Killian v. Aug. & K. R. Co.*, 78 Ga. 751; *Atlanta, etc., R. Co. v. Ayers*, 53 Ga. 12; *Ga. R. R. v. Goldwire*, 56 Ga. 196, cases cited in the case at bar, are reported with the Georgia cases in this volume of AM. NEG. CAS.
2. In *Priestley v. Fowler*, 3 Mees. & W.

## TAYLOR v. GEORGIA MARBLE COMPANY.

*Supreme Court, Georgia, March Term, 1896.*

[Reported in 99 Ga. 512.]

1. AGENT — VICE-PRINCIPAL — FELLOW-SERVANT — BRAKEMAN INJURED.— An agent or employee of a corporation who, in the discharge of his general duties, has charge of a particular branch or department of the corporation's business as to which he acts in the capacity of a vice-principal, and as such employs and has control of all the subordinate servants who are to work under him, is, as to one of these whose duty it is to obey his orders and who takes his orders from no other source, a *quasi master*, and not a fellow-servant in the sense that the subordinate will have no right of action against the corporation, for personal injuries caused without fault on his part by the negligence of the superior.
2. DEMURRER — ERROR.— It was error in the present case to sustain the defendant's demurrer to the plaintiff's declaration.

(Syllabus by the Court.)

APPEAL from Pickens Superior Court. *Judgment reversed.*

"The petition as amended alleged: On November 14, 1894, defendant, though having no charter as a railroad company of Georgia, was acting as a railroad company, doing business as such in Pickens county, engaged in running and operating a railroad and running a train of cars thereon, and was engaged in the business of hauling freight thereon for itself and others. Plaintiff was in its employment as brakeman and car-coupler on said train. One McHan was the engineer of the train, and was in sole charge thereof for defendant and placed in charge thereof by it, and had by its direction entire control and management of the train and of the plaintiff as brakeman and coupler. Plaintiff was a subordinate employee under the direction and control of McHan, as defendant's agent, and it was his duty to obey McHan's orders. McHan ordered him, whenever the train went on side-tracks on which cars were standing, to always go ahead and get between the cars and the approaching train and couple such cars to the train. For some months plaintiff had been acting as car-coupler on the train under McHan and had always

1, the defendant was sued by his servant, injured by the breaking down of a van, in which he and a fellow-servant were carrying goods for his master, by reason of its weakness and excessive loading. Defendant was held not to be liable. The court said that the principal was under no implied obligation to his servant for the sufficiency of the van, as he had no more knowledge of its condition than the servant himself.

obeyed said order and had very frequently, and as often as the train passed onto a side-track on which cars were standing, gone in between such cars and the approaching train and coupled the cars to the approaching train, and this had always been done with safety, as the engineer would slow up the train just before reaching the car, as it was his duty to do. It had been the invariable custom of the engineer, and was his duty, whenever plaintiff went between the train and the car to couple the two together, to wait for a signal from plaintiff to move after the train and car came together, before the engineer caused the train to run any further. On said date the train having passed onto a side-track of defendant's railroad, on which a car was standing, plaintiff, without fault or negligence on his part, but in the discharge of his duty and in accordance with the orders and instructions of McHan, passed between the car and the approaching train, for the purpose of coupling the car to the train, fully believing that McHan would adopt the usual precaution of slowing up the train as it approached the car; but McHan, well knowing that plaintiff had gone between the car and the train for the purpose of coupling the two together and was then and there between the car and the train for that purpose, negligently and carelessly ran the train at great and unusual and unlawful speed against the car, whereby plaintiff was unable for lack of time to withdraw himself, and his hand and arm were caught between the car and the train and held with such force that he was unable to extricate himself and they were broken, mangled and crushed. Instead of waiting, as was his custom and duty before proceeding further, for the signal from plaintiff to move, McHan negligently and carelessly ran the train and the car for a considerable distance along the track, with plaintiff's hand and arm pressed and fastened between the two, grinding and lacerating the flesh and bones of the hand and arm between the car and the train, and producing the most excruciating torture to plaintiff. By reason of the force with which they were first crushed and the grinding to which they were so subjected, plaintiff's hand and arm were so injured that afterwards it became necessary to amputate the hand and portion of the arm. He was at the time a stout, healthy young man, twenty-eight years old and earning \$30 a month. By the loss of his arm and hand he has been rendered completely helpless and unable to earn a living, to his damage \$10,000. By reason of defendant's negligence he suffered

great bodily pain, not only at the time of the occurrence, but while sick from the effects of the injury, to his damage \$5,000. He was put to great expense for medical treatment and nursing, to his damage \$500, and he was damaged by loss of time \$500. When the injury was received, defendant had run the train into the yard of the Southern Marble Company, for the purpose of hauling a car of freight for the master, and was thus engaged in the business of a common carrier. When the train ran on the side-track approaching the cars standing thereon, in obedience to the orders as aforesaid of the engineer, plaintiff prepared to run in between the train and the car it was approaching, in order to couple the two; but the engineer rushed the train so rapidly together, plaintiff did not go in between the two at first, it being impossible to do so, but the cars standing on the track being struck forward by the collision left an opening between them and the train, and he ran in to couple the same together when they should meet, but the cars, having been struck and kicked up, returned to the train still approaching them, and the speed of the train and of the returning cars combined caused them to come together so rapidly that plaintiff, who had run in between in obedience to orders and in the discharge of his duty, did not have time to realize his danger until too late, and did not have any reason to apprehend that the collision would be so sudden, and being already by said train with his hand and arm between the cars, "and having seized the link which is used to couple the cars together and which was attached to the train, introduced the link into the drawhead of the car on the side-track," and sought to withdraw his hand, but the contact of the train and car was so sudden that in withdrawing his hand it was caught between the bumpers, which are between the draw-heads and the outside of the car, and it was impossible to withdraw his hand and arm from the position they were necessarily in in coupling the cars, without passing them between said bumpers which projected from the cars. The engineer's real object was to kick the cars on the side-track and not to couple to them, but he did not notify plaintiff of this, and plaintiff did not know it, but supposed it was his duty to carry out his orders, and the engineer was negligent in not notifying plaintiff of his said intention. The engineer employed all the hands wanted with said road; and had employed plaintiff. If the engineer, after the cars were coupled, had waited for signal before proceeding, plaintiff

could and would have been released from his perilous condition and the injury to him would not have been so great. His hand had been caught about the wrist between the bumpers, but on account of the engineer continuing to move the train the play of the bumpers sideways and slightly up and down crushed the bones of the hand and arm and extended the injury above the wrist and broke the bones of the arm above the wrist. Plaintiff was unable to extricate his hand and arm until the train stopped. In spite of the injuries to his hand received by the train striking the car, it would not have been necessary to amputate his hand and arm but for the additional injury produced by the engineer continuing to move the train after plaintiff's hand was caught and after the coupling had been made. At the time the injury occurred plaintiff had been employed by defendant only three months, and was comparatively ignorant of the running of railroad trains. Up to the time of his employment by said engineer, plaintiff had had no experience in such matters, and the engineer knew the same. The engineer had never before since plaintiff was employed gone upon a side track and kicked the cars thereon; the plaintiff had no notice or knowledge up to the time of and not until after the injury that it was the engineer's intention to kick said cars on the side track.

"The demurrer was on the following grounds: No cause of action is set forth. The declaration does not show that plaintiff made any effort to avoid the injury when he discovered that the train was approaching him at a high rate of speed; it does not show his position at that time, and does not show that he could not have avoided the injury by the exercise of ordinary care. The manner in which plaintiff was injured is not set forth with sufficient detail to put defendant upon notice of the facts upon which plaintiff insists. The declaration does not show the position of plaintiff and his hand to the train and car at the time the injury was received, or how the injury was inflicted, or between what parts of the train and car the plaintiff's hand was mashed, or in what way he was engaged at the time of the injury."

H. H. PERRY and W. T. DAY, for plaintiff.

CLAY & BLAIR and JOHN HENLEY, for defendant.

**Atkinson, J.** — 1. The liability of the defendant in the present case is referable to the general law bearing upon the relation of master and servant; for, while the defendant was engaged in running and operating a railway train, it was a mere private

institution, not operated under and by virtue of any franchise granted by the State, and therefore does not fall within the provisions of our code imposing liability upon railroad companies in favor of an employee injured, when without fault himself, in consequence of the negligence of a fellow-servant. The sole question for determination is whether the person whose alleged negligence caused the injury was, in a legal sense, a fellow-servant with the person injured, and engaged as such in and about the common employment of the master.

Corporations act only by and through their agents; and while in the loose general sense all agents and servants of a corporation, without reference to rank or dignity, are co-employees, they are not fellow-servants in the sense which relieves the corporation from liability for the negligent act of one resulting in injury to another, where the person whose negligence caused the injury occupies the position of *quasi*-master as to the person injured. *Atlanta Cotton Factory v. Speer*, 69 Ga. 137, 14 Am. Neg. Cas. 22, *ante*. Such a doctrine would result in defeating, in every instance, a right of recovery in favor of an employee of a corporation, injured in consequence of the negligence of another employee. Where the master delegates to one of his employees such authority as subjects the will and discretion of all other employees, engaged in and about the particular business, to the direction and control of the person to whom that authority is delegated, such person may be well said to be a vice-principal, and to stand in the relation of the master himself. The negligence of such person may properly be imputed to the master as his act, and particularly is this true with respect to the employees of corporations; for if the master be not present in the person to whom it has delegated this authority, it is not and can never be present at all. It appears in the present case, according to the allegations in the declaration, that the engineer through whose negligence the injuries were alleged to have been sustained had, by direction of the common master, the corporation, sole charge and entire control and management of the train, and of the plaintiff in his capacity as brakeman and coupler thereon. It was alleged that the plaintiff was a subordinate employee under the direction and control of the engineer, and that it was his duty to obey the orders of the engineer. The declaration alleges that he was employed by the engineer. These allegations being admitted by the demurrer to be true, the engineer, while

a co-employee, was not in a legal sense a fellow-servant with the plaintiff. The master had deputed to the engineer authority over those who were subordinate to him, and the negligence of the person exercising such authority was the negligence of the master itself. See *Chicago, Milw. & St. Paul R'y Co. v. Ross*, 112 U. S. 377 (1).

2. The declaration in all other respects, was sufficient, and the relations existing between the person injured, and the one through whose negligence the injuries were alleged to have resulted, not having been of such a character as to defeat a recovery upon the ground that they were fellow-servants, the demurrer to the declaration should have been overruled.

Judgment reversed.

## CHEENEY v. THE OCEAN STEAMSHIP COMPANY.

*Supreme Court, Georgia, October Term, 1893.*

[Reported in 92 Ga. 726.]

**LABORER LOADING VESSEL STRUCK BY BALE OF COTTON THROWN INTO HOLD — GUARD AT HATCHWAY — WARNING — SUPERINTENDENT — FOREMAN — FELLOW-SERVANT — ERRONEOUS NON-SUIT.** — 1. Where it was essential to the safety of laborers employed by a steamship company in the loading of its ship, whose place of work was in the hold of the vessel, that a "hatch-tender" should be stationed at the hatchway to warn them when bales of cotton were about to be thrown into the hold, it was the duty of the company to supply a person to be stationed at the hatchway for that purpose.

2. The superintendence of this work having been entrusted to Hoffman, if he represented the company in the duty of furnishing a sufficient supply of employees to effect the work with reasonable and ordinary safety to those engaged in performing it, he was, as to this duty, the *alter ego* of the company, and not a fellow-servant of the laborers.
3. If Hoffman was general foreman over the loading of the whole ship, the laborers were entitled to rely upon his promise, when he ordered them to go into the hold and begin work, that a "hatch-tender" would be sta-

1. In *Chicago, Milw. & St. P. R'y Co. v. Ross*, 112 U. S. 377, it was held (four justices dissenting) that a railroad company was liable for injury to an engineer of a train resulting from the negligence of the conductor in failing to deliver to the engineer a telegram ordering the train side-tracked to allow another train to pass and a collision followed.

But see *New England R. Co. v. Conroy*, 175 U. S. 323, 7 Am. Neg. Rep. 182 (1899), where the decision in that case does away with the vagueness and uncertainty heretofore existing in the Federal rule of fellow-servants because of the decisions in the *Ross* and subsequent cases decided on the authority of the *Ross* case, referred to in the *Conroy* case.

tioned at the hatchway; and if one of them, relying upon this promise, obeyed the order, and no such person was placed at the hatchway, the company would be responsible for a personal injury occasioned by his being struck by a bale of cotton thrown into the hold without warning, if he did not know or had no reason to suppose that it was about to be thrown down, although the person who threw it down was a fellow-servant and was negligent in doing so in the absence of a "hatch-tender" without himself giving notice. If a "hatch-tender" was duly stationed but afterwards absented himself without the knowledge of Hoffman, his absence would be the negligence of a fellow-servant and not that of the company. If there was no promise to station a "hatch-tender" and the plaintiff went into the hold knowing there was no "hatch-tender," he could not recover.

4. On the second trial of this case, nothing appearing from which it could be inferred that there was a "hatch-tender" employed as such, or that any person was in fact stationed at or ordered to attend the hatchway, the court erred in granting a nonsuit (1).

(*Syllabus by the Court.*)

APPEAL from nonsuit in the City Court of Savannah. *Judgment reversed.*

SAUSSY & SAUSSY, for plaintiff.

LAWTON & CUNNINGHAM, for defendant.

**Simmons, J.** — Cheeney sued the Ocean Steamship Company for damages from personal injuries alleged to have been caused by his being struck by a bale of cotton which was thrown from the hatchway into the hold of the defendant's ship and fell upon him while he was engaged in its service stowing cotton in the hold. He alleged that it was the company's duty to give notice at the hatchway whenever a bale of cotton was thrown into the hold, so that persons engaged in stowing the cotton below might get out of the way of the falling bale and avoid injury to themselves, but at the time in question the company did not give such warning, and the bale was thrown down without notice to the plaintiff; that he was acting with due care and caution; that

1. *Laborer injured while loading vessel — Defective hatchway — Erroneous nonsuit.* — In *BURNS v. THE OCEAN STEAMSHIP CO.*, 84 Ga. 709 (March, 1890), judgment of nonsuit was reversed, the syllabus to the official report stating the case as follows: "In an action for damages, the plaintiff's evidence tending to sustain his allegations, to the effect that the defendant had a ladder leading into the hold of its ship which was defective because of the absence

of one of its rounds, and on which a person engaged at the same work with plaintiff attempted to descend, and by reason of the defect fell, and to save himself jumped against a bale of cotton, which fell through the hatchway leading to the lower hold, where plaintiff was at work, injuring him without any fault on his own part; the case was for consideration by the jury, and the award of a nonsuit was erroneous."

the company had always kept a man stationed at the hatchway, as was its duty, to give warning whenever a bale was thrown down, but on this occasion it did not have and keep a man so stationed, and did not cause any notice or caution to be given when the bale was thrown down, and was thus guilty of gross negligence and indifference to the safety of its employees. On the first trial of the case the plaintiff obtained a verdict, and this court, upon exceptions to the overruling of the defendant's motion for a new trial, reversed the judgment of the court below. 86 Ga. 278 (1). The case is now before us upon exceptions to the grant of a nonsuit.

We think the court erred in granting a nonsuit. Our decision when the case was here before was based upon a materially different state of facts from that appearing in the present record. On the former trial it was shown that a man had been placed at the hatchway to give notice to the hands below, and this man was at his post and in the discharge of his duty a few minutes before the injury occurred; and we held that his negligence in absenting himself from the hatchway and failing to give notice was the negligence of a fellow-servant, and therefore no recovery could be had. At the last hearing nothing appeared from which it could be inferred that any person was stationed at or ordered to attend the hatchway or was employed for that purpose; indeed the evidence tends to show the contrary. Moreover, it now appears, but did not appear at the first trial, that before the plaintiff went into the hold, the foreman in charge of the work promised him that a man would be stationed at the hatchway to give warning as the bales were about to be thrown down (2).

1. The former decision in *OCEAN STEAMSHIP CO. v. CHERNEY*, 86 Ga. 278 (1890), reversed the judgment for the plaintiff, the official syllabus stating the case as follows: "A steamship company is not liable in damages for an injury to its laborer employed in stowing cotton in the hold of its vessel, by a bale of cotton thrown down the hatchway, where the injury is caused by the failure of the hatch-tender (who is usually the engine driver or is taken indifferently from the laborers employed in loading the vessel) to give warning of the approach of the falling

bale, whether it be thrown when the hatch-tender is present and fails to give the warning, or, while he is absent, it be thrown without notice by another servant engaged in the same business. In either case the injury is occasioned by the negligence of a fellow-servant."

2. The judgment of nonsuit having been reversed (see case at bar), the new trial resulted in a verdict and judgment for plaintiff; and a subsequent decision of the Supreme Court *affirmed* the judgment rendered for plaintiff in the City Court of Savannah. See *OCEAN STEAMSHIP CO. v. CHERNEY*, 95 Ga. 381 (1895).

It is well settled that among the legal obligations of a master to his servant, forming a part of the implied contract between them, is that of making reasonable provision to protect the servant against dangers to which he is exposed while conducting the work he is employed to do, and of supplying a sufficient number of servants to effect the work with reasonable and ordinary safety to those engaged in performing it; and if the proximate cause of an injury sustained by the servant while so engaged is the failure of the master to exercise ordinary prudence in this respect, the master is liable, unless the servant may fairly be regarded as having assumed the risk incident thereto. The failure of the master in this respect stands upon the same footing as the failure to supply suitable and sufficient machinery or appliances for conducting the work safely. Wood, *Master and Servant* (2d ed.), § 394, and cases cited. The evidence in this case tends to show that it was essential to the safety of those employed in the hold of the vessel at the time in question that a "hatch-tender" should be stationed at the hatchway to warn them when bales were about to be thrown into the hold; and if this was so, it was the duty of the company to supply a person to be stationed at the hatchway for that purpose. If all the men employed in the loading of the ship were engaged in other parts of the work from which none of them could be spared to give warning at the hatch, the number of employees ought to have been increased, and one of them directed to perform this particular service. So long as no employee was charged with the duty of giving warning at the hatch, there was a failure on the part of the defendant to carry out its implied contract with those employees for whose safety such warning was necessary.

The plaintiff seems to rely, however, not so much upon the failure of the company in its general duty of supplying a "hatch-tender" as upon the failure to comply with a special undertaking on this particular occasion to station one at the hatchway, which undertaking, he claims, was the condition upon which he went into the hold and entered upon the work. It appears from the evidence that one Hoffman, the foreman under whose direction he was working, ordered the plaintiff and another employee to go into the hold and begin work, but they hesitated about doing so, and when asked by Hoffman why they did not go down as he had ordered, they told him they could not go down because there was nobody to attend the hatch. He said they must go

down, but they still hesitated, until finally Hoffman said, " Well, go on down and get to work, and he would put a 'hatch-tender' there." Relying upon this promise they went down and began work. The plaintiff testified that he would have refused to go into the hold if he had not expected that a "hatch-tender" would be placed at the hatch. It was contended on the part of the defendant, that if Hoffman was negligent in failing to station a man at the hatch, his negligence was that of a fellow-servant of the plaintiff, and no recovery could be had. If Hoffman had authority to employ such men as were necessary to effect the work with reasonable and ordinary safety, or authority to direct that one of the employees should attend the hatch, he was, as to the duty of supplying a "hatch-tender," the *alter ego* of the company, and was not a fellow-servant of the other employees in such sense as to cast upon them the risk of his failure to discharge that duty. There was sufficient evidence to show, *prima facie*, that he was invested with this authority, and there was no evidence to the contrary. The work of loading the company's ships appears to have been under the general supervision of another, but it appears that Hoffman was foreman of the ship on which the plaintiff was working, that the men employed in the loading of the ship were bound to obey him, and that he had authority to "check on" as many men as were necessary for the work conducted under his supervision. The acts of a person authorized by the master to perform a duty which the master owes to his servant, in so far as they pertain to that duty, are the acts of the master himself; and when the servant is injured by reason of a failure to perform it, the master cannot escape liability by setting up that the duty devolved upon a fellow-servant of the person injured. An obligation which the law imposes upon the master for the benefit of his servants cannot be evaded by shifting it upon one of their number. See *Atlanta Cotton Factory v. Speer*, 69 Ga. 137, 148, 14 Am. Neg. Cas. 22, *ante*; *Savannah, Florida & Western R'y Co. v. Goss*, 80 Ga. 524; *Wood, Master and Servant* (2d ed.), §§ 436, 438 *et seq.*, 447, 448; *McKinney, Fellow-Servants*, § 25; 7 Am. & Eng. Encyc. of Law, 834. and cases cited by these authorities; *Flike v. Boston & Albany R. Co.*, 53 N. Y. 549, 553.

If Hoffman represented the defendant in making this promise, the plaintiff had a right to rely upon it when he obeyed Hoffman's orders and entered upon the work, and his knowledge

when he went into the hold, that no one was then at the hatch to give warning, would not preclude a recovery. It does not appear that there was any imminent danger at the time of his going into the hold, for no cotton was then being thrown into the hold, and he was there fifteen or twenty minutes before any came down; nor did anything happen while he was at work there, and up to the time he was hurt, to indicate that the promise had not been fulfilled. The bale that struck him was the first that came down. "If the servant, having a right to abandon the service because it is dangerous, refrains from doing so in consequence of assurances that the danger shall be removed, the duty to remove the danger is manifest and imperative, and the master is not in the exercise of ordinary care unless or until he makes his assurances good. Moreover, the assurances remove all ground for the argument that the servant, by continuing the employment, engages to assume its risks. So far as the particular peril is concerned, the implication of law is rebutted by the giving and accepting of the assurance; for nothing is plainer or more reasonable than that the parties may and should, where practicable, come to an understanding between themselves regarding matters of this nature." Cooley, *Torts* (2d ed.), § 559, and cases cited. And see, Wood, *Master and Servant* (2d ed.), § 378 *et seq.*; *Clark v. Holmes*, 7 Hurlst. & Norm., 937, 944 (1); *Hough v. R'y Co.*, 100 U. S. 213; *New Jersey, etc., R. Co. v. Young*, 1 U. S. Appeals (2d Circ.), 96, and cases cited; *Laning v. N. Y. Cent. R. Co.*, 49 N. Y. 521; *Thorp v. Mo. Pac. R'y Co.*, 89 Mo. 650.

If the foreman complied with his promise and stationed a man at the hatch, and the person so stationed negligently absented himself, without the knowledge of the foreman, his absence would be the negligence of a fellow-servant and not that of the company. If there was no promise to station a man at the hatch, and the plaintiff went into the hold knowing there was no

i. In *Clark v. Holmes*, 7 Hurl. & N. 937, it appeared that the plaintiff was employed by the defendant to oil dangerous machinery. At the time the plaintiff entered upon the service the machinery was fenced, but the fencing became broken by accident. The plaintiff complained of the dangerous state of the machinery, and the defendant promised him that the fencing should be restored. The plaintiff, without any negligence on his part, was severely injured in consequence of the machinery remaining unfenced. Held, that the defendant was liable for the injury. This appears to affirm *Holmes v. Clark*, 6 H. & N. 349.

"hatch-tender," we think, in view of the evidence as to the danger of conducting the work without one and his own knowledge of the danger, he would not be entitled to recover.

The fact that the employee who threw the bale into the hold was negligent in doing so when no "hatch-tender" was there, without himself warning those in the hold, would not defeat the plaintiff's right to recover, if the defendant was negligent in failing to supply a "hatch-tender." The negligence of a fellow-servant does not excuse the master from liability to a co-servant for an injury which would not have happened had the master performed his duty. "If the negligence of the master contributes to the injury to the servant, it must necessarily become an immediate cause of the injury, and it is no defense that another is likewise guilty of wrong." McKinney, Fellow-Servants, § 16, and cases cited; Grand Trunk R. Co. *v.* Cummings, 106 U. S. 700; N. J., etc., R. Co. *v.* Young, 1 U. S. Appeals, 96; Cone *v.* R. Co., 81 N. Y. 206; Coppin *v.* R. Co., 122 N.Y. 557; Paulmier *v.* R. R. Co., 5 Vroom (N. J.), 151; Clark *v.* Soule, 137 Mass. 380; Pullman Palace Car Co. *v.* Laack (Ill.), 18 L. R. A. 215 [143 Ill. 242, 14 Am. Neg. Cas., *post*].

What was said in the former decision in this case as to the negligence of the employee who threw down the bale does not conflict with anything here said, because, under the evidence then before us, no failure of duty on the part of the defendant was shown.

Judgment reversed.

## RANKIN *v.* MERCHANTS AND MINERS' TRANSPORTATION COMPANY ET AL.

*Supreme Court, Georgia, September Term, 1884.*

[Reported in 73 Ga. 229.]

**LABORER ON VESSEL FALLING FROM GANGWAY AND DROWNED — GUARDS TO GANGWAY — NEGLIGENT ROLLING OF BARRELS — SERVANT OF STEVEDORE — INDEPENDENT CONTRACTOR — PLEADING — DEMURRER.** — 1. A declaration against a foreign corporation and a stevedore, for the homicide of an employee, alleged as follows: The company paid the stevedore to load a ship; the gangway used in loading was its property, and furnished to the stevedore for that use; it failed to provide proper guards and side-skids to the gang-plank to prevent the

- deceased from falling therefrom; "that deceased was standing on the gang-plank, under the directions and by the orders of the stevedore or his agents, and was attempting to ease down, over said gang-plank into said steamship, the said barrels of resin, which said barrels of resin the said (stevedore), with the grossest negligence and without regard to the dangerous position of the said deceased, caused to be rolled down the said gang-plank in such great numbers and rapid succession that the skill and strength of the said deceased were totally insufficient to manage the same, the result of which was his being drowned in the river by the gross negligence and criminal conduct of the said defendants;" Held, that no case was made against the corporation. The mere employment of the stevedore or contractor did not make the company liable for an injury to one of the stevedore's servants; and the case falls within the ruling in *Daly v. Stoddard*, 66 Ga. 145, and in *McDonald v. Eagle & Phenix Mfg. Co.*, 68 Ga. 839 (1).
2. If it were clearly alleged that, by the stevedore's orders and directions, the barrels were precipitated so rapidly upon deceased as to cause his death, then this gross negligence or disregard of life on the part of the stevedore in so ordering the fellow-servants of the deceased would amount to criminal negligence, and take the case as to him without the rule in the cases cited; but construing the plea most strongly against the pleader, it is not distinctly alleged that he precipitated the barrels himself or ordered others to do so; and there was no error in dismissing the declaration on demurrer.
  - (a.) No motion was made to amend or otherwise to retain the action against the stevedore alone.

*(Syllabus to official report.)*

APPEAL from judgment in the City Court of Savannah. The facts appear in the decision. *Judgment affirmed.*

1. In *DALY v. STODDARD*, trustee, *et al.*, 66 Ga. 145 (1880), it was held (as per official syllabus) that: "For a widow to have a right of action for the homicide of her husband, his death must have been caused by some act, or by the criminal negligence of the defendants. The allegations that the defendants erected and rented a building having a platform or bridge as its means of egress and ingress; that the tenants had no way of moving their furniture into the building except over such platform; that while in the employment and at the instance of the tenants, the husband of the plaintiff was endeavoring to move an iron safe into the building, the platform gave way and that he was killed, and that this resulted from the improper and faulty construction of such platform by the landlords (who were the defendants), are not sufficient. Such a declaration is demurrable."
- It was also held that "the Acts of 1850, Cobb's Digest, 476, and of 1856, pamphlet, 155, cannot be construed to give a right of recovery in this case. The substance of our law is in the Code, § 2371, and in 56 Ga. 201, and this case is not embraced therein."
- In *Cottingham v. Weekes*, 56 Ga. 201 (1876), referred to in *Daly v. Stoddard*, *supra*, it was held that "a widow may recover for the homicide of her husband, whether the homicide be the act of a natural or artificial person, or the result of intention or criminal negligence."

See *McDonald v. Eagle & Phenix Mfg. Co.*, 68 Ga. 839, reported in 14 Am. Neg. Cas. 12, *ante*.

GEORGE W. OWENS, CHARLTON & MACKALL, for plaintiff in error.

W. S. BASINGER, for defendants.

**Jackson, Ch. J.** — A motion was made to dismiss this declaration, on the ground that no cause of action is set out therein; in other words, on general demurrer, the action was dismissed. It is a suit by the wife for her husband's homicide against "the Merchants and Miners' Transportation Company," and Merritt W. Dixon, a stevedore in the employment and pay of that company; and the death occurred by reason of the loading of a ship of the company by the stevedore and his servants.

1. The question is, whether the case falls within *Daly v. Stoddard*, 66 Ga. 145, and *McDonald v. The Eagle & Phenix Mfg. Co.*, 68 Ga. 839, 14 Am. Neg. Cas. 12, *ante*. In other words, do the allegations make a case of felonious intent in the killing or such criminal negligence as constitutes an ingredient in the offense of involuntary manslaughter, because those cases, by a unanimous bench, most clearly so construe the meaning of our statute. Code, § 2971.

In regard to "the Merchants and Miners' Transportation Company," there cannot arise a doubt that the case made against it is a case within the rule, and weaker than either of those. It is a corporation of Maryland, with an agency in Savannah; and the only allegation against it, in respect to the accident or incident of the death, is that it had employed and paid the stevedore to load the ship, and that the gangway used in loading the ship was its property and furnished to the stevedore for that use; and that it failed to provide proper guards and side-skids to the gang-plank to prevent deceased from falling therefrom, — the declaration then alleging "that deceased was standing on the gang-plank under the direction and by the order of the stevedore or his agents, and was attempting to ease down over said gang-plank into said steamship the said barrels of resin, which said barrels of resin the said Dixon (the stevedore) or his agents, with the grossest negligence, and without regard to the dangerous position of the said deceased, caused to be rolled down the said gang-plank in such great numbers and rapid succession that the skill and strength of the said deceased were totally insufficient to manage the same," the result of which was his being drowned in the river "by the gross negligence and criminal conduct of the said defendants."

It will thus be seen that all which was done by the company was to employ and pay the contractor, or stevedore, to use the technical name, to do the job of loading the ship, and to furnish for the ship's use on such occasions a gang-plank, which, in consequence of the manner in which the job was done, the numbers and rapidity with which the barrels of resin were rolled upon deceased, proved inadequate for that special occasion. If the manner of rolling down the barrels had not been so rapid, it is not alleged that the unhappy incident would have followed; indeed, the inference is clear from the whole declaration that it would not.

Surely it cannot be contended that the mere employment of the stevedore to do the job made the company liable. Such a man we understand to be "one whose occupation is to load and unload vessels in port" (Webster's Dictionary); in other words a contractor or jobber for special business, ready to be employed by anybody on his line. Can it be possible that his bad conduct in doing the job can make the employee criminally liable? Indeed, the case made is stronger. It is not alleged that the stevedore caused the rapid rolling, etc., but the averment is that he or his agents did it. Is the employer to be responsible not only for his employee, the contractor under him, but for all the under-employees, agents and servants, the deceased being one of them? Surely the doctrine "*respondeat superior*" does not extend that far (1). It cannot most assuredly in a transaction involving criminal neglect.

It is thus seen that there is no shadow of cause of action in this case against the company; none in furnishing the plank, because, if properly used, it might have done well, according to the whole scope of the declaration; and none in the employment of the stevedore, because he was a contractor with his own servants, the deceased being one, and neither the company at Baltimore nor its Savannah agents having aught to do with those servants.

2. In regard to the stevedore, the problem is more difficult of solution.

If a clear declaration were before us that by his orders and direction these barrels were precipitated so rapidly upon deceased as to cause his death, then this gross negligence or disregard of life on the part of the employer in so ordering the fellow-servants

1. See Note on the Rule of *Respondeat Superior*, in 14 Am. Neg. Rep. 694-715.

of the deceased would amount to criminal negligence and take the case without the rule in *Daly v. Stoddard*, 66 Ga. 145, and *McDonald v. Eagle & Phenix Mfg. Co.*, 68 Ga. 839, 14 Am. Neg. Cas. 12, *ante* (1); but there is no distinct allegation that he did it himself, or ordered others so to precipitate the barrels. The allegation is that he or his agents caused it to be done. So that for aught that the declaration shows, it may have been a fellow-servant of the deceased who caused the whole disaster, and without the assent and connivance, much less the order and command, of the superior; and if so, "*respondeat superior*" does not apply, and the stevedore would not be liable. Construing the pleadings most strongly against the pleader, we cannot say that the court erred in dismissing the action as to him also.

The fact is, that from the manner in which the pleader mixes the company at Baltimore with the stevedore in Savannah, it is rather difficult to strike the name of the company and leave the stevedore in, with any sense left in the declaration. We presume the real action was intended to be against the corporation, and the stevedore was joined as a sort of servant, but the money power was the main object of attack, and if that be gone, the plaintiff cares little for what is left.

At all events, no motion to amend in the court below having been made, so as to perfect the declaration against the stevedore, and no effort of any sort having been made to retain the action, either there or here, before us, against him alone, on leave to amend or other directions, we give the case the direction which strict pleading and strict law demands, and affirm the judgment.

Judgment affirmed.

EMPLOYEE WORKING IN HOLD OF VESSEL INJURED BY FALL OF BALE OF COTTON — DAMAGES — DEFECTIVE APPLIANCE — INSPECTION — KNOWLEDGE OF DEFECT. — In **THE OCEAN STEAMSHIP COMPANY v. MATTHEWS**, 86 Ga. 418 (October Term, 1890), employee working on vessel injured by fall of bale of cotton caused by a defective appliance, judgment for plaintiff for \$1,000 in the City Court of Savannah was *affirmed*, the official syllabus stating the case and points decided as follows:

" 1. The verdict in the plaintiff's favor for \$1,000 damages for permanent and painful injuries sustained by him from a falling bale

i. See note as to these cases, on page 76, *ante*

of cotton, while he was in the employment of the defendant and in the discharge of his duty in the lower hold of a ship, was not contrary to law or evidence, and was not excessive.

" 2. The instructions of the court which are complained of, taken in connection with the entire charge and the evidence upon which they were predicated, were as favorable as the defendant was entitled to ask.

" (a.) The master was not relieved from liability by the fact that the hooks from which the bale of cotton slipped might, while in their defective condition, have been used or had been used without injury.

" (b.) If the defect was one which the master should have known, he will be presumed to have known it. If he should have known, he was negligent in not knowing; and negligent ignorance is equivalent to knowledge. The patent and obvious character and apparent age of the defect may indicate that the master should have known it.

" (c.) It appearing that the servant (the plaintiff) did not know of the defective condition of the hooks, and that it was not his duty to inspect and apply them, but that his employment confined him to the lower hold of the ship, where he did not and could not see them; and it further appearing that the master, instead of furnishing safe and suitable hooks, provided such as were obviously unsafe and unfit at and before the time of the injury, and had been so long enough for their unsafe condition to have been discovered by the master in the exercise of ordinary care, the assumption that the master knew of their condition is proper; and there having been no effort to show otherwise, the verdict should stand."

EMPLOYEE INJURED WHILE UNLOADING COAL FROM VESSEL — INDEPENDENT CONTRACTOR. — In **BROWN v. SMITH & KELLY**, 86 Ga. 274 (1890), it was held that "for an injury inflicted by the negligence of the servant of the defendants in the performance of work for which he was hired by them to another who has complete control and direction of him for the occasion, the defendants having no such control, though receiving payment for the work performed by him, and the person to whom he is hired having the exclusive right to discharge him and put another in his place or to put him about other work, there is no liability on the defendants; he being, for the time, not their servant but that of the hirer." The action was for damages for injuries sustained by plaintiff while unloading a cargo of coal from a vessel, the plaintiff being hired by the person unloading the vessel, the latter using a pair of mules and a driver hired from defendants.

Plaintiff's hand and a finger were injured. Judgment for defendants in the City Court of Savannah *affirmed*. Authorities cited were *Laugher v. Pointer*, 5 Barn. & C. 547; *Murphy v. Caralli*, 3 H. & C. 461 (1); *Kimball v. Cushman*, 103 Mass. 194; *Vary v. R. R. Co.*, 42 Iowa, 246.

*Person delivering wood to mill not servant of proprietor — Liability of proprietor for injury to such person.* — In *WADSWORTH, WILLIAMS & CO. v. DUKE*, 50 Ga. 91 (July Term, 1873), two cases involving same questions and tried together in the Floyd Superior Court, one by the father for the loss of services of his minor son and the other by the son for injuries sustained by alleged negligence of Wadsworth, Williams & Co., judgments for \$500 and \$1,000 were *affirmed*, it being held that "one engaged in selling and delivering wood to the proprietor of a mill at so much per cord, is not an employee of the proprietor, so as to put him in the situation of one who takes the risk upon himself of negligence in those running the mill."

**LIABILITY FOR INJURIES TO CONVICT WHILE WORKING ON RAILROAD.** — In *THE CHATTAHOOCHEE BRICK COMPANY v. BRASWELL*, 92 Ga. 631 (1893), convict hired out to railroad construction company by the brick company to whom the penitentiary company hired the convict, injured while working on the railroad, judgment against the brick company in favor of plaintiff in the City Court of Atlanta, was *affirmed*. The official syllabus to the report states the points as follows:

"1. In the trial of an action for physical injuries against two defendants as joint tort-feasors, an instruction by the court that there was no evidence warranting a finding against one of them

1. In *Laugher v. Pointer*, 5 Barn. & C. 547 (1826), where the owner of a carriage hired of a stable keeper a pair of horses to draw it for a day, and the owner of the horses provided a driver, through whose negligent driving an injury was done to a horse belonging to a third person, it was held (by *ABBOTT*, C. J., and *LITTLEDALE*, C. J.) that the owner of the carriage was not liable to be sued for such injury. (*BAYLEY* and *HOLROYD*, JJ., dissented.) The case is very fully discussed and numerous authorities cited in the opinions by the learned justices. See 5 Barn. & C., 547-580.

In *Murphy v. Caralli*, 3 Hurl. & C. 461 (Exchequer of Pleas, 1864), it appeared that some bales of cotton were insecurely piled in a warehouse by cotton porters acting under the control of the warehouse-keeper, but in the employ of the defendant, a cotton merchant, to whom the bales belonged. A few days after, the plaintiff being lawfully in the warehouse to recanvass the bales of another cotton merchant, was injured by the fall of one of the defendant's bales. Held, that the defendant was not responsible for this injury.

wrought no injury to the other, it appearing from the record that the defendant discharged by the instruction of the court would not be liable to contribution in favor of the one against whom the verdict was rendered.

" 2. The rule forbidding a recovery from his master by a servant who subjects himself to injury by going without objection into a place known by him to be dangerous, is not applicable to a convict whose movements are controlled and directed by a guard or boss having and exercising the power of compelling the convict to obey his orders.

" 3. The plaintiff, a convict, having been leased by the State to a penitentiary company, and that company having hired him, with other convicts, to another corporation engaged in the work of constructing a railroad, and he having been put to work under the control of a guard employed and paid by the latter corporation, and being required to obey the orders of such guard, this corporation is liable to the plaintiff for injuries received in consequence of his having gone, under orders from the guard, into a place where a dangerous explosive was being used, although all the convicts so hired may have been under the general charge of a 'captain' appointed by the governor. This is true whether it was, or was not, lawful for such convicts to be placed under the control and management of the guard.

" 4. The evidence was conflicting, but taking as true the version of it most favorable to the plaintiff, the verdict was warranted, and there was no error in denying a new trial."

*Death of convict caused by cruel treatment of chain-gang boss — Employer of boss liable.*

BOSWELL *v.* BARNHART, 96 Ga. 521 (August, 1895) was an action by Louisa Barnhart against Boswell for damages for the homicide of her husband who, she alleged had been convicted of a misdemeanor and sentenced to labor in the chain-gang, and while in the charge of Boswell, who for private gain had established a convict camp, had been subjected to cruel treatment, exposure, neglect, excessive and unreasonable tasks, etc., by reason of which he died. Verdict and judgment for \$750 for plaintiff in the Greene Superior Court *affirmed*. It was held that a "chain-gang" boss is not a fellow-servant of a chain-gang prisoner, and the employer of the "chain-gang boss" is responsible for wrongful or negligent acts on the part of the latter, by which a prisoner is deprived of his life. [H. T. LEWIS, appeared for plaintiff in error; SAMUEL H. SIBLEY, for defendant in error.]

BRAKEMAN STEPPING FROM ONE CAR TO ANOTHER FALLING OVER LUMP OF COAL IN COAL CAR—IMPENDING COLLISION—QUESTION FOR JURY.—In **SIMMONS v. EAST TENNESSEE, VIRGINIA AND GEORGIA RY CO.**, 92 Ga. 658 (1893), judgment for defendant in the City Court of Atlanta was reversed, **SIMMONS**, J., in rendering the opinion, stating the case as follows: “It appears from the declaration that the plaintiff, while on the defendant's train where he was employed as a brakeman, was placed in a position of imminent peril by the conduct of the engineer in not turning the engine into a switch and in going forward without slackening speed, when another train from an opposite direction was due and about to meet this train; that the conductor of the train the plaintiff was on, becoming alarmed at this, attempted to signal the engineer with a lantern, and directed the plaintiff to do the same thing, and he did so, but their lanterns went out, and the only means of communicating with the engineer and stopping the train was for some one to run forward on the cars and tell the engineer to stop; that the conductor shouted excitedly and repeatedly to the plaintiff to run forward and do this, saying: “Go, go, go quick; we will hit before you can get there;” whereupon the plaintiff ran with the greatest possible speed from one car to another towards the engine, in order to avoid the apprehended collision; but while passing over a coal-car, he lost his footing and fell over a large lump of coal, injuring himself severely in the manner alleged in the declaration; all of which, it is alleged, was caused by the negligence and improper conduct of the defendant; the negligence being alleged to consist in the engineer's allowing his train to get behind the schedule time, and in not turning the train into the switch but passing on, when he knew, or ought to have known, that the other train was due there. We think the court below erred in holding that the declaration does not set forth a cause of action.” \* \* \* “The negligence, whatever it may have been, which occasioned the perilous situation, is not too remote, if the collision was so imminent as to render the conduct of the plaintiff necessary and proper under all the circumstances of the occasion; and whether this was so or not was a question for the jury.”

## EAST TENNESSEE, VIRGINIA AND GEORGIA RAILWAY COMPANY v. SUDDETH.

*Supreme Court, Georgia, October Term, 1890.*

[Reported in 86 Ga. 388.]

BRAKEMAN INJURED BY STEPPING ON PIECE OF ORE WHILE PASSING OVER LOADED CAR TO GIVE SIGNAL — LAMPS EXTINGUISHED — PRESUMPTION — ACCIDENT — PLEADING AND PRACTICE. — 1. That the company furnished its employee with a lamp which became extinguished whilst the latter was making a signal with it in the usual way, raises no presumption that the company was negligent.

2. That the employee, whilst passing in the course of his duty over a car loaded with ore, stepped upon a piece of ore, which turned under his foot, whereby he was precipitated from the car and severely injured, is evidence of injury by accident rather than by any fault or negligence of the company. That the car was loaded by heaping up the ore at each end, leaving a depression in the middle, affords no suggestion of unusual or improper loading.
3. Where the alleged injury was in one county and the suit was brought in another, and these facts appear on the face of the declaration, appearance and pleading to the merits, without objecting to the jurisdiction, waived the objection; and the question could not be raised at a subsequent term by withdrawing the plea and moving to dismiss the action for want of jurisdiction.

(*Syllabus by the Court.*)

APPEAL from judgment for plaintiff in the Gordon Superior Court. The case is reported in the decision. *Judgment reversed.*

BACON & RUTHERFORD, MADDOX & LONGLEY and DORSEY & HOWELL, for plaintiff.

J. C. FAIN and O. N. STARR, for defendant.

Bleckley, Ch. J. — 1. Not even the faintest tinge of a presumption was raised against the company in respect to the lamp. On that subject the plaintiff testified as follows: "After setting switch, I signalled the engine ahead. This is done by raising lamp up and down. This I did in the usual way. In making signal my lamp went out. Defendant furnished me with this lamp; it was in the caboose when I went to work." The only act of the company proved by this testimony is the furnishing of the lamp. Who filled it with illuminating material, trimmed it and lighted it, does not appear. Nor does it appear what caused it to become extinguished in the act done by the plaintiff himself of moving it up and down in making the signal in the usual way. There is no suggestion that the lamp was of poor quality, or

that there was any defect in its construction, or any failure to supply proper materials with which to keep it lighted. As the plaintiff was charged with the custody and use of the lamp, it was certainly his duty to keep it in a condition for safe use, in so far as the quality of the lamp and the materials supplied would enable him to do so. Whether he performed this duty or not, his testimony gives no hint. He was no less unhurt after the lamp went out than he was before, so that the going out of the lamp did not cause the physical injury for which his action is brought. Even if it had done so, it would not have raised any presumption against the company, unless he had proved himself free from fault in all the dealings with the lamp which devolved on him. *Central R. R. v. Kenney*, 58 Ga. 485.

2. The plaintiff evidently regarded the lamp as in a fit condition to be relighted; for to relight it at the engine was his purpose when he climbed upon the train and commenced going forward over the tops of the cars to reach the engine. Why the more simple and ready resource of striking a match was not available, does not appear, except inferentially. He says nothing about having no matches; but this was probably the case, inasmuch as he started to the engine to obtain the means of relighting. In passing over the cars in the dark, he sustained the injury, and the next question is whether the evidence establishes any negligence of the company in loading the car from which he fell. On that subject he testifies as follows: "The car next to the box-car was loaded with iron-ore, and there were three or four flat cars ahead loaded with lumber. The car loaded with iron-ore was what is called a dinkey. It is a short car with one set of trucks to each end, this is to say four wheels. It is a regular ore-car. The ore was piled up at the ends of the car because of there being only one set of trucks, and it was not full in the middle. I had never seen the car or noticed it on the train. The train was made up in Rome by the yardmen. I got down from the box-car I was on, after setting up one brake, passed to the north end of the car loaded with ore, put my left foot down and was in the act of stepping across to the other car, when the piece of ore under my left foot turned and I fell off the car; and I fell between the cars and my leg was cut off." Another witness, introduced by plaintiff, testified as follows: "This car was a regular ore car. It is short. I have seen lots of them. They are usually loaded by piling up the ore on them. Being

short, you have to do this in order to get a load on them." It seems to us that there is no suggestion in this testimony that the car was loaded in an unusual and improper manner. Granting that the plaintiff was free from fault in all he did, his own testimony and that of his witness screened the company by pointing out mere accident rather than the fault of any one as the cause of the injury. While the general rule is that the company must explain where the fact or injury is proved and the plaintiff shows himself free from fault, yet where he is the only employee who directly participates in the act resulting in the injury, and where the evidence which goes to make out his case points distinctly to accident, rather than to any negligence whatever on the part of the company or its employees, it would seem unreasonable to apply the general rule. Why should the company be required to prove itself free from fault, when the evidence for the plaintiff fails even to suggest any fault whatever against it? The car was an ordinary ore-car loaded by heaping up the ore at the ends. It was usual to heap up the ore in such cars. And the plaintiff's evidence suggests a reason why the heaping should be done at the ends, namely, because the cars have a style of trucks which would render the ends capable of supporting a heavier weight than the middle. Although this particular car was taken on at Rome in the night and the plaintiff had not seen it before he undertook to pass over it, yet he does not profess to have been unacquainted with that kind of cars or with the usual manner of loading them with ore, nor does he or his witness state that this car was loaded in an unusual way. On the contrary, the fair inference from their testimony, as above recited, is that the loading was such as was usual and as the plaintiff might have had reason to expect. His fall was caused by the turning of one piece of the ore under his foot. *Prima facie*, such an occurrence is a mere accident. It was an accident that he stepped on that particular piece of ore, and an accident that it turned under his foot. Such casualties, it seems to us, appertain to the risk of the service in which the plaintiff was engaged. *Lee v. Central R. R. Co.* (this term), 86 Ga. 232 (1).

1. *Brakeman injured by foot striking clinker on railway track — Railroad not liable.*—In *Lee v. Central R. R. & Banking Co.*, 86 Ga. 231 (October Term, 1890), it was held (as per official syllabus) that: "The presence of one clinker of unusual size on the margin of a railway track where switching is to be done, and on which a brakeman accidentally steps in descending from a

3. Had the defendant's motion, made at the third term, to withdraw the plea which it had filed at the first term to the merits, been granted, the defendant would have been in no condition to move to dismiss the case for want of jurisdiction. Pleading to the merits without pleading to the jurisdiction, and without excepting thereto, admits the jurisdiction of the court. Code, § 3461. The declaration showed on its face that the injury complained of was done in Floyd county. The defendant was obliged to take notice of that allegation before pleading to the merits, and consequently the suggestion that the plea was filed inadvertently, is without efficacy. Parties must be held to full diligence in taking notice of facts which appear on the face of the pleadings.

For error in refusing a new trial upon the merits of the case, the judgment is reversed.

**BRAKEMAN INJURED BY DEFECTIVE COGWHEEL ON BRAKE — DUTY TO FURNISH SAFE APPLIANCES — RAILROAD LIABLE.** — In **THE CENTRAL RAILROAD v. HASLETT**, 74 Ga. 59 (September Term, 1884), judgment for plaintiff in the Monroe Superior Court was *affirmed*, the official syllabus to the report stating the points decided as follows:

" 1. Grounds of exception abandoned here will not be considered.  
" 2. Where the order in which a case was argued resulted from an arrangement entered into between counsel for both parties and the court, it furnishes no ground for exception.  
" 3. There was no error in refusing to charge that, " if there is a theory of the defendant which is supported by evidence and is not contradicted by other evidence in the case, then the jury would be authorized to adopt the same, unless they should believe that the witnesses who supported it were unworthy of credit." Whether such request was correct law or not, it was too general and vague, and might have misled the jury.

" 4. Newly discovered evidence, which is merely cumulative and which might have been procured in time for the trial by the exercise of proper diligence, will not require a new trial.

" 5. It is the duty of a railroad company to furnish its employees moving engine in the due course of his safe, it is not required that the surface duties, will not render the company shall be kept clear of every object liable to answer for a personal injury which by chance might cause accident which the brakeman thus sustains. dental injury." Judgment for defendant. For outdoor premises to be reasonably affirmed.

with reasonably safe material and tools for their use while working in its service; but if the employee is aware of the dangerous character of any particular tool or instrument, and continues to use it, he cannot have redress for any damage he may sustain by its use; nor would it alter the rule if an employee knowingly uses a dangerously defective tool under the immediate orders of a superior employee.

"(a.) The evidence in this case does not show affirmatively that the injured employee had knowledge of the defect in the machinery which caused his injury, nor is it clear that it was any part of his duty either to inspect the piece of machinery in question or to report its defects. The testimony as to the manner in which he used it and his care in applying it was conflicting, and the presiding judge having approved the finding of the jury, this court will not interfere.

"(b.) In the absence of other evidence upon the point, it does not follow that a hand, whose duty it is to apply the brakes on a train, has sufficient skill to determine their fitness for use by an inspection.

"(c.) The case of Central R. R. & B. Co. *v.* Kenney, 58 Ga. 485, 64 Ga. 100, does not conflict with these views." [See the Kenney case, reported in 14 AM. NEG. CAS., *post.*]

The facts in the HASLETT case are as follows: Haslett brought suit against the Central Railroad for a personal injury. On the trial, the testimony on behalf of the plaintiff was, in brief, as follows: He was a train hand on defendant's train, and part of his duty was to put on the brakes. He had made one trip on an old cab known as cab No. 28, and had put on brakes at all the stations without accident. On the second trip, at a certain station, the whistle was blown to put on brakes, and he put on his brakes as tightly as possible, but when he let it loose, the cogwheel failed to catch on the ratchet, and the break-wheel turned back very rapidly, catching plaintiff's hand, breaking it and twisting his arm severely. The cab was an old one, in bad condition, and two or three of the cogs were broken from the wheel. It is the duty of the car inspector to see that the cars are in good condition. The brake in this case ran upward through the seat, the wheel on which the plaintiff placed his hand being above the seat and the cogwheel underneath. On examination the cogwheel appeared as if it had been broken for some time. There was also other evidence as to the extent of the injury. The evidence on behalf of the defendant was, in brief, as follows: The cab was in good condition; the cogwheel was on the floor and sixteen inches below the seat. Beside the cogwheel was

a foot pad which the brakeman used to hold the ratchet-wheel in its place in applying the brake. It was not the custom of the car-inspector to inspect the inside of cars. He testified that that was done by conductors and train-hands who used the car, and that he examined only such defects inside the cars as his attention was called to. The cab had been used, and plaintiff had been working on it for about two weeks before the accident, and subsequently thereto it was continually used. On examination, after the accident, no cogs were missing from the wheel. The jury found for plaintiff \$1,200. Defendant appealed but judgment affirmed. HALL, J., delivered the opinion, the rulings in which are stated in the foregoing official syllabus. T. B. CABANISS (HARRISON & PEOPLES) and JOHN I. HALL, appeared for plaintiff in error; MILLEDGE & SMITH, T. P. WESTMORELAND and BERNER & TURNER, for defendant in error.

## COOK v. WESTERN AND ATLANTIC RAILROAD.

*Supreme Court, Georgia, December, 1882.*

[Reported in 69 Ga. 619.]

COURT PRACTICE—SUBMISSION OF CASE—QUESTION FOR JURY—  
BRAKEMAN IN TRYING TO ASCERTAIN CAUSE OF FIRE ON TOP  
OF CAR FATALLY INJURED—DEFECTIVE APPLIANCE.—A judge  
is not bound to send a case to the jury when there is not sufficient evidence  
to support a verdict for the plaintiff, if found; nor where, admitting all the  
facts proved and all reasonable deductions therefrom, a verdict for the  
plaintiff would be set aside, because no recovery should be had. In such  
cases he may grant a nonsuit. On the other hand, a defendant cannot  
compel the court to take the place of a jury and pass upon the facts of a  
case by granting a nonsuit, because he would not be satisfied with a verdict  
for the plaintiff. The court may always remit questions of fact to the jury,  
and he should not fail to do so whenever the plaintiff makes out a *prima facie* case.

(a.) Negligence being peculiarly a question of fact for the jury, and in a suit  
against a railroad for a homicide of an employee, the absence of negli-  
gence on his part and its existence on the part of the company being in  
doubt, a nonsuit should not be granted, but the case should be submitted  
to the jury (1).

*(Syllabus to official report.)*

1. In COOK v. WESTERN & ATLANTIC R. R., 72 Ga. 48 (1883), homicide of plaintiff's husband, an employee of defendant, caused by negligence of defendant's servants in running its cars, judgment of Whitfield Superior Court granting new trial was reversed, the official syllabus stating the rulings as follows:

"1. When this case was before the Supreme Court before, it was held that the grant of a nonsuit was error, and

APPEAL from nonsuit in the Whitfield Superior Court. *Judgment reversed.*

W. K. MOORE and D. W. HUMPHREYS, for plaintiff in error.  
R. J. McCAMY, for defendant.

**Crawford, J.**— This suit was brought by the widow of an employee of the defendant for the homicide of her husband.

Upon the conclusion of plaintiff's evidence, on motion of defendant's counsel, a nonsuit was granted, and the plaintiff excepted.

The testimony relied upon by the plaintiff was, that as a brakeman on defendant's road, the deceased attempted to ascend a box-car from a flat-car, to ascertain the cause of fire which he saw flying from one of the car wheels in front of him; that, in his effort to do this, the spike on the box-car broke loose, and in attempting to throw himself back on the flat-car, he fell through, and was so mutilated that he died on the following day; that it was his duty to go forward and ascertain whether or not the brake was on, and that the negligence of defendant in having this insecure spike in the end of the car, upon which he had to descend to enable him to get up on the same, caused his death.

The plaintiff's testimony also showed the following facts: That the casualty occurred near the Chattahoochee river, on the out-bound night train from Atlanta to Chattanooga; that it was the duty of the brakeman always to let off brakes on leaving the yard at Atlanta; that the fire seen was the subject of conversation between the deceased and another brakeman, who testified

that the case should be submitted to the jury. This point is *res adjudicata*, and the jury having found for the plaintiff, a new trial will not be granted on that ground. [See former appeal, 69 Ga. 619.]

"2. An employee of a railroad company may by contract waive his right to sue for injuries not arising from criminal negligence on the part of the company, or its other employees; but any negligence, either of omission or commission, on the part of other employees of the road, in connection with their business, from which serious injury results, constituted criminal negligence, and a contract waiving the

right to sue for injuries resulting therefrom is contrary to public policy, and void.

"(a.) The discretion of the presiding judge in granting a first new trial had been exhausted in the case, and the grant of another was error."

On the question of contract releasing railroad company from liability for injuries to employees caused by negligence, BLANDFORD, J., cited Western & Atlantic R. R. Co. v. Bishop, 50 Ga. 465, Western & Atlantic R. R. Co. v. Strong, 52 Ga. 461, and also the Act of 1876 (Code, § 4586b), in support of the ruling on the invalidity of the contract referred to in the case.

on the trial, that when they saw it, he said to deceased one of them ought to go forward and turn it off; deceased said he would go; witness told him to wait until the train got near the river before he went, as they would then be going slowly; that about three or four hundred yards from the river, witness saw his light about the flat-car, and he thought that deceased was about to climb up; that there was a station very near the river; that the engineer blew on brakes as the train approached the station; that the deceased had his lamp, which was burning, and could have told whether the spike was loose, or had worked out any way, if he had inspected it.

The foregoing substantially states the testimony as set out in the record. The rule of law governing such cases is, that where the party injured is an employee of the road, and the particular business in which he is hurt is his, he must show, first, that he himself was without fault before he is entitled to claim a recovery, and unless this is done, he makes no case against the company. When, however, he shows that he was faultless, the onus is shifted, and it becomes the duty of the company to show itself free from negligence.

Doubtless, the judge below was fully satisfied that the failure to let off brakes as the train passed out of the yard at Atlanta; that the going forward when the train was so near the station; that the blowing on brakes as the train approached the station; that the necessity for attempting to get upon the box-car at the time he did, not being apparent that the failure to examine the spike before he risked himself upon it, knowing the peril attending it, and especially when it was not one of the cars of his company, all combined failed to show that he was faultless, and, therefore, he granted a nonsuit.

But, on the other hand, it is insisted that this brakeman had the right to feel assured that an inspection of this car had been made, and that it was safe; and it being his duty to ascertain the cause of the fire seen, he went forward for that purpose, and was killed by the negligence of the company; and that, therefore, the nonsuit was error.

In this opinion we concur. Whether the deceased was without fault, and the company free from negligence, are questions particularly for the jury; they are facts, and facts are not to be passed on by the judge, except for the purpose of determining when the onus is shifted, or whether they give or deny a legal right.

Evidently the judge below thought that the plaintiff failed to make out a case, and, therefore, awarded a nonsuit. In this we think he erred, as the facts were such as should have been passed on by the jury, and it should have been left to them to find whether or not the deceased was without fault, and if he were, then to have further found whether the company was free from negligence.

In so ruling, we do not intend to encroach upon the rights and duties of the bench. Neither do we intend to hold that the judge is bound to send a case to a jury where there is not sufficient evidence to support a verdict, if found for the plaintiff; nor that he shall send a case to the jury, where he would set aside the verdict, if admitting all the facts proved, and all reasonable deductions therefrom, the plaintiff ought not to recover. On the contrary, in all such cases a judgment of nonsuit is the proper legal disposition thereof.

And this is the doctrine laid down in the case of *Tison et al. v. Yawn*, 15 Ga. 493, and not departed from in *Zettlet v. City of Atlanta*, 66 Ga. 196. It is true it was also held in the *Tison* case, that the court was not compelled to award a nonsuit, if after verdict it would grant a new trial because the verdict was contrary to evidence, which ruling is approved by this court as sound in principle and practice. In the first place, the judge would not be justified in anticipating that the jury would find contrary to evidence, and in the second, there exists no legal right in the defendant to compel the judge, instead of the jury, to pass on the facts. He may always send them down to be inquired of by the jury, and he should not fail to do so whenever the plaintiff makes out a *prima facie* case.

Judgment reversed.

## SLOAN v. GEORGIA PACIFIC RAILWAY COMPANY.

*Supreme Court, Georgia, October Term, 1890.*

[Reported in 86 Ga. 15.]

**BRAKEMAN USING HAND INSTEAD OF STICK TO COUPLE CARS — RULES — CONTRIBUTORY NEGLIGENCE.** — A brakeman upon a railway who is under orders always to couple cars with a stick, and who has been in the employment of the company for a considerable time and has always heard that such was the rule of the company (as it in fact was),

cannot recover of the company for an injury to his hand sustained whilst endeavoring to make a coupling directly with his hand without the use of a stick. It makes no difference that other employees frequently or customarily disregarded the rule unless the company, with knowledge of their practice, acquiesced in it in a way to sanction it, or practically to abrogate the rule. Nothing less would relieve the plaintiff from abiding by his uniform orders (1).

(*Syllabus by the court.*)

APPEAL from nonsuit in the City Court of Atlanta. *Judgment affirmed.*

HOKE & BURTON SMITH, for plaintiff.

JACKSON & JACKSON, for defendant.

**Bleckley, Ch. J.** — The plaintiff's hand was injured whilst he was between the cars endeavoring to make a coupling by the direct use of his hand. He testified at the trial that he had been in the employment of the company for a considerable length of time, and said: "I have always heard that it is the rule of the company to couple with a stick. That is what I have always heard. Those were my orders to always couple with a stick." The printed rules of the company contain this clause: "Cars must not be coupled by hand; sticks for the purpose long enough to prevent going between the cars will be furnished on application in Atlanta, Birmingham and Columbus, M." It thus appears that the plaintiff's information as to the rule was correct. He had provided himself with a stick of his own selection, which he thought was more suitable for the purpose than those furnished by the company, and this stick he had endeavored to use in making this particular coupling; but failing to succeed, he went between the cars and tried to accomplish the work with his hand. Had he abided by the rule of which he had always heard, and by the orders which had been given to him, it is manifest that the injury of which he complains would not have been received. Whatever fault there may have been in other employees, that fault would have been harmless to him if he had not violated his instructions. The whole pressure of the case, therefore, is upon the question whether he ought to be excused for committing

**I. ROME & CARROLLTON CONSTRUCTION CO. v. DEMPSEY,** 86 Ga. 499 (1891), was decided on the authority of **SLOAN v. GA. PAC. R'Y CO.,** 86 Ga. 15 (the case at bar), the judgment for plaintiff in the Floyd Superior Court being re-

versed, it being held that "an employee who is under orders to couple cars with a stick only and is injured while coupling with his hand without a stick, is himself in fault and cannot recover."

such violation. The court charged the jury that: "It would make no difference (if you find that he knew of the rule or that the facts in evidence charged him with notice of it), that other employees frequently or customarily disregarded it. To make this reply available as an excuse for non-observance by the plaintiff, you must be satisfied from the evidence that the defendant, the railroad company, knowing of the practice of employees to disregard it, acquiesced in it in such a way as to sanction it or as to be held practically to have abrogated it." We think this charge was correct in view of the fact that the plaintiff, besides having always heard that there was such a rule, had orders to always comply with it. Such being his orders, he should not have taken any license from the conduct of others, so long as he had reason to think that the rule was still in force and that he was expected to abide by it. This view of the subject disposes of several grounds of the motion for a new trial, and indeed, under the evidence, is decisive of the substantial merits of the whole case. Some of the grounds of the motion are very trivial, we might say almost frivolous, and to discuss them in detail would be a waste of time. It is sufficient to say that, in the light of the plaintiff's own testimony, he has no cause for a new trial, for the one controlling reason that he owed the duty to the company as well as to himself to keep his hand out of the situation of danger in which he placed it. He knew his orders and they had always been invariable; there had been no exception. By violating them in this instance, he exposed himself to the very peril against which the company had endeavored to guard him. Why then should the company compensate him for a loss sustained by his own misconduct? The law is not so unreasonable as to require a new trial in a case like this over the finding of a jury and the approval of that finding by the trial judge.

The court committed no error in overruling the motion. Judgment affirmed.

BRAKEMAN INJURED COUPLING CARS — COUPLING STICKS — RULES — ERRONEOUS CHARGE. — In **RICHMOND & DANVILLE R. R. CO. v. MITCHELL**, 92 Ga. 77 (1893), brakeman injured while coupling cars, the injuries being sustained by Mitchell while in company's service in Alabama, verdict and judgment for plaintiff in the City Court of Atlanta was *reversed* for erroneous charges by the court. The official syllabus states the points in the following paragraphs:

"Inasmuch as the plaintiff below, when he undertook to make the coupling, knew that the supply of hands ordinarily requisite to the occasion was deficient, and nevertheless consented without objection to make the coupling, and inasmuch as the mode of making it and the care and diligence to be exercised would in no way, after the plaintiff engaged in the work, be affected by the want of more hands, the deficiency was irrelevant to the issue on trial, and it was error to give in charge to the jury anything whatever on that subject.

"A written or printed rule, carefully prepared, which prohibits brakemen 'from coupling or uncoupling cars except with a stick,' and declares that 'brakemen or others must not go between the cars under any circumstances for the purpose of coupling or uncoupling, or adjusting pins, etc., when an engine is attached to such cars or train,' does not apply to a case in which the engine was not attached to any car or train and in which the brakeman stationed himself, in the way usually practiced by employees, upon the foot-board of the pilot on the tender, and while there attempted to withdraw with his hands, without using a stick, a pin and link from the coupling apparatus of the engine, the engine and tender moving backwards at the time towards a standing car in the rear, for the purpose of being coupled thereto."

On a subsequent trial in the City Court of Atlanta there was a verdict and judgment for plaintiff for \$8,000, which, on appeal by defendant, was *affirmed* by the Supreme Court. See RICHMOND & DANVILLE R. R. Co. v. MITCHELL, 95 Ga. 78 (1894). It appeared that plaintiff was injured in Alabama, and the law of that State pertinent to the facts in the case was applied.

In RICHMOND & DANVILLE R. R. Co. v. BELL, 92 Ga. 493 (1883), the rule of the Mitchell case (preceding paragraph herein) was applied. There are no facts or statement (other than the short syllabus) to the BELL case, but, apparently, the case related to injury to an employee while coupling cars. It was held that although the case on its merits was a very weak one and the trial court might well have granted a new trial, there was no error, and judgment in the City Court of Atlanta was *affirmed*.

BRAKEMAN INJURED WHILE COUPLING CARS — RULES — EVIDENCE — SIGNAL — QUESTION FOR JURY — FELLOW-SERVANT — CONTRIBUTORY NEGLIGENCE. — PARKER v. GEORGIA PACIFIC R'Y CO., 83 Ga. 539 (1889), was an action by a brakeman to recover damages for injury to his arm caused by the dead-blocks of moving cars while he was coupling

cars. Verdict and judgment for defendant in the City Court of Atlanta, which, on appeal, was *affirmed*. Among the rulings were the following as stated in the official syllabus:

" 2. The evidence being sufficient that the rule-book offered contained the rules of the company of force when the employee was injured, the book was admissible without first proving that the employee had knowledge of the rules it contained. His knowledge was matter for either prior or subsequent verification.

" 3, 4. Whether an employee giving a signal to a co-employee had a right to have it observed, or whether it was possible to transact business without acting upon the assumption that it would be observed, is for decision by the jury, not by a witness.

" 6. Failure of a railroad employee to extricate himself from a perilous situation brought on by the negligence of a co-employee, when he could do so by the use of ordinary care, will bar his right to recover."

## CENTRAL RAILROAD v. DE BRAY [and *VICE VERSA*].

*Supreme Court, Georgia, November, 1883.*

[Reported in 71 Ga. 406.]

**EMPLOYEE ORDERED TO STEP FROM MOVING CAR TO COUPLE CARS INJURED BY STEPPING ON TIMBER ON ROADWAY—VENUE—PLEADING—EVIDENCE—WITNESS—DAMAGES—INSTRUCTION.**—Though one may be a train-hand in the employment of a railroad, if he is injured without fault on his part by the negligence and carelessness of other agents of the company, he may recover. [Citing *Central R. R. v. Mitchell*, 63 Ga. 173, 179.]

- (a.) Where a conductor in charge of a train ordered a trainman under him to step from the cars while in motion, in order to couple cars standing on a side track to the main body of the train, coupling being a part of his business, the obeying of such order will not prevent a recovery by him for an injury, if he used all reasonable care and skill in so doing.
2. The defendant filed no plea to the jurisdiction of the court, and no issue was therefore made as to the venue. Were it otherwise, the testimony showed that the injury was done at Barnesville, near the depot; and this court will take judicial cognizance of the fact that Barnesville is in Pike county.
3. There was no error in rejecting the testimony of a witness that "any person with ordinary care could have gotten off over the skids where plaintiff did, without being hurt." This was a conclusion which the jury might find, but was not for the witness to state.
4. It was proper to reject the testimony of witnesses that if one obeys the order of a conductor and gets off a moving train "he does it at his own risk." Witnesses must testify to facts; the court will give the law.
5. The seventh ground of the motion is covered by the third headnote above.

6. Where a witness testified that he did not know what the rules of the company were, but proposed to state that formerly he was an officer of the company, and that no conductor or other officer had the right to order an employee to get on or off a moving train, and that if such order were given, the employee would not be required to obey it, such testimony was properly rejected. [Citing *Willy v. Gazan*, 69 Ga. 506.]
7. It is not matter for expert testimony to show that no railroad employee is required to get on and off a train while in motion; that neither the conductor nor any other officer can require an employee to get on and off a moving train, and that if such order is given, the employee is not required to obey it.
  - (a.) Whether or not the conductor had the right to give the order or the plaintiff was required to obey it, the former did give the order and the latter obeyed it. Under the facts, the act of the conductor was that of the corporation, and the latter cannot escape responsibility on account of its own wrong.
  - (b.) Whether it be the fault of an employee to obey an order of his superior, depends upon whether it would be rash and dangerous to do so, and where there was no apparent danger in so doing, it would not be fault on his part. [Citing *Western & Atlantic R. R. Co. v. Wilson*, 71 Ga. 22.]
8. The opinion of a witness as to matters of fact is not admissible in evidence.
9. Where plaintiff, a man of twenty-three years of age, was greatly wounded and bruised, suffering great pain for a long time, and being compelled to have his right hand amputated above the wrist, a verdict of \$4,700 was not only not excessive, but was quite moderate. [Citing *Southwestern R. Co. v. Paulk*, 24 Ga. 366; *Cooper v. Mullins*, 30 Ga. 146; *Lang v. Hopkins*, 10 Ga. 37.]
10. The verdict was not contrary to the charge of the court containing the law of the case.
11. Where a principle of law has been given in the general charge as favorably to the excepting party as it could expect, a failure to give the principle when embodied in a subsequent request will not work a new trial.
  - (a.) Opinion of JACKSON, J., in *Central R. R. v. Mitchell*, 63 Ga. 181, adopted and approved.(1)
12. The court is not bound to give a request in charge when the same point has been covered by his charge, nor should he give in charge a request not warranted by the facts in the case.
13. The nineteenth ground is covered by the ruling on the eighteenth ground.
14. There was no error in refusing to charge that "if to do the freight business it was necessary to use a pair of short 'skids' for the hauling of freight, and it was necessary for the proper handling of freight to keep the 'skids' between the main and side tracks, and the 'skids' were kept for such purpose in a usual and customary place, the plaintiff cannot recover." If the injury resulted from the carelessness and negligence of defendant's agents in leaving these "skids" on the roadway, it could make no difference whether such negligence had become usual or customary. [Citing *Central R. R. v. Mitchell*, 63 Ga. 181.]

1. See the Mitchell case, 63 Ga. 181, reported in this volume of AM. NEG. CAS., *post*.

15. There was no error in refusing to charge that, if among different modes of performing his duty, some of which were safe, plaintiff chose one which was less safe, he took the risk of his choice, and could not recover; and in charging instead, that this was a circumstance for the jury to consider with the other facts in deciding whether the plaintiff was at fault or not. The question of fault or negligence was for the jury alone, and was fairly submitted to them.
16. The twenty-second ground is covered by the fourteenth headnote.
17. There was no error in charging that if "skids" or planks were placed on or near the track of defendant's road when the injury occurred, and they occasioned the injury to plaintiff while in obedience to orders, and without fault or negligence on his part, the company would be liable.
18. The charge embraced in the twenty-fourth ground was right, as already held.
19. If the plaintiff has shown the defendant to have been negligent, to defeat a recovery it must be shown that he was likewise negligent or at fault.
20. So when plaintiff has shown injury to himself, without fault on his part, it would be incumbent on defendant to show that the injury did not result from the want of ordinary and reasonable care and diligence on the part of its servants and agents.
21. The charge complained of in the twenty-seventh ground was warranted by the evidence.
22. As no special damages were found by the jury, and as the verdict is such as to warrant the conclusion that no such damages entered into the same, the defendant was not hurt by a charge on that subject.
23. The charge as a whole is unexceptionable, and the parts excepted to, when taken in connection with the whole, constitute no grounds of error. [Citing Central R. R. v. Mitchell, 63 Ga. 180; Atlanta Cotton Factory v. Speer, 69 Ga. 137, 14 Am. Neg. Cas. 22, *ante*.]
24. The judgment being sustained, the cross-bill of exceptions is dismissed.

*(Official syllabus to the report.)*

APPEAL from judgment for plaintiff in the Pike Superior Court.  
*Judgment affirmed.*

De Bray brought suit against the Central Railroad on account of an injury which happened to him while employed by defendant as an extra train-hand. The facts are sufficiently stated in the first division of the decision. The jury found for the plaintiff \$4,700. Defendant moved for a new trial, on the following among other grounds:

- (1.) Because the verdict was contrary to law and evidence.
- (2.) Because the evidence failed to make out the case of the plaintiff as alleged in his declaration.
- (3.) Because the court ruled out a portion of the answer of W. A. Tinsley to the third direct interrogatory, as follows: "And any person with ordinary care could have gotten off over the skids where plaintiff did without being hurt."

(4.) Because the court ruled out a portion of the answer of W. A. Tinsley to the eleventh cross-interrogatory, as follows: [The witness testified that it was usual for a brakeman to jump off a moving train to couple cars, when told to couple, and then added the sentence ruled out] — "but he does it at his own risk and the risk of his life."

(5.) Because the court ruled out a portion of an answer of R. Schmidt to a cross-interrogatory, as follows: "He does so at his own risk," [that is, gets off a moving train, if so ordered by the conductor.]

(6.) Because the court ruled out a portion of an answer of R. Schmidt to a cross-interrogatory, as follows: "A person using ordinary care can pass over them (referring to skids lying between the track) with perfect safety. It is true that a person can, with ordinary care, get off or on a moving train passing over such skids with perfect safety. It is habitually done."

(7.) Because the court erred in ruling and deciding as follows: A. J. White, a witness for defendant, stated that he was president of the Macon & Western railroad for about nine years, commencing in 1865, and while he was president he made and had printed about one-third of the rule-book that was put in evidence by the plaintiff, the balance of the book being made since he went out of office (which rule-book plaintiff proved by R. Schmidt was in force at the time plaintiff was injured). This rule-book does not contain all of the orders and instructions that are given to employees, but certain general rules for their guidance. Defendant then proposed to prove by White that no conductor or other officer had the right to order an employee to get off or on a moving train, and if such order was given the employee could not be required to obey it. The court ruled that, as the witness did not know what the rules were at the time of the accident, and proposed to testify what they were at the time he was in office, he could not do so, and rejected the evidence.

(8.) Because the court erred in ruling and deciding as follows: Defendant proved by A. J. White that he was an expert in all the departments of railroading, and then proposed to prove by him that no employee was required to get off or on a moving train, and that neither the conductor nor any other person could require him to do so, and if such order were given, the employee would not be required to obey it. This proposed proof was rejected by the court.

(9.) Because the court erred in ruling and holding as follows: A. J. White testified that the lantern plaintiff used was furnished him that he might see how to perform his duties with safety to himself; that he knew the character of the lantern. Defendant then offered to prove by the same witness that a person in getting off a train could, by the light of the lantern, readily see any object near the track; which proposed proof the court rejected.

(10.) Because the verdict is excessive, it being for an amount much larger than the plaintiff would be entitled to recover under the evidence.

(11.) Because the verdict is contrary to the following charge of the court: "If you believe from the evidence that plaintiff got off the car in a careless manner that was calculated to throw him to the ground, and if the manner of getting off contributed to his fall, he cannot recover."

(12.) Because the verdict is contrary to the following charge of the court: "If you believe from the evidence that plaintiff could have remained on the train until it was stopped, and if you believe he got off while the train was in motion, and if you believe that such act was at his own risk, then he cannot recover."

(13.) Because the verdict is contrary to the charge of the court: "If you believe from the evidence that the plaintiff knew the cab on which he was would stop near where he had to do his work, and if you believe plaintiff could have got off at such a place with perfect safety, and if you believe plaintiff got off before the cab reached that place, and while the car was in motion, and if you believe from the evidence that plaintiff took the risk of getting off the moving train, then he cannot recover, no matter how you construe the direction given the plaintiff by the conductor."

(14.) Because the verdict is contrary to the following charge of the court: "If you believe from the evidence that the manner of getting off the train contributed in any way to his injury, then plaintiff cannot recover."

(15.) Because the verdict is contrary to the following charge of the court: "If you believe from the evidence that plaintiff was furnished with a lantern for the purpose of enabling him to perform his duties; that it was his duty to use the care of a prudent man in trying to discover whether or not there were obstructions near the track, and if you believe from the evidence that the plaintiff, by a prudent use of the lantern, could have

discovered and avoided the obstructions, and if he failed to use his lantern with the care of a prudent man, then he cannot recover."

(16.) Because the court refused to charge the following request: " If plaintiff contributed, either immediately or remotely, directly or indirectly, to his injury, then he cannot recover, regardless of the position of the skids, or any other negligence of defendants' agents."

(17.) Because the court refused the following request: " And although you may believe that the plaintiff was directed by the conductor to get off at the place where he left the car, while the car was in motion, he cannot plead the order of the conductor as an excuse for the act, if the act was one attended with danger and the doing the act put him in fault. The order of a superior could not protect him."

(18.) Because the court refused the following request: " It would be the duty of an employee connected with the running of a freight train to know what tools, implements or appliances are used in conducting the business of handling freights, and where such tools, implements or appliances are kept; if kept at any particular place, or at or about any particular locality, and if plaintiff was a train-hand on defendants' train, and if the defendant had kept short skids for their use and kept them at or near a certain place, it was the duty of the plaintiff to look for them, and he would be charged with a knowledge of their presence at such a place."

(19.) Because the court refused to charge the following request: " If to do the freight business it was necessary to keep a pair of short skids for the use of the hands employed to handle the freight, and if it was necessary for the proper handling of freight to keep the skids between the main and side tracks, then, if the skids were kept for such purpose and in a usual and customary place, plaintiff cannot recover."

(20.) Because the court refused to charge as follows: " If, among different modes of performing his duty, some of which were safe, the plaintiff chose one less safe or more dangerous, he took the risk of his choice, although other servants did likewise; and, if you so believe, plaintiff cannot recover." But the court modified the request as follows: " If among different modes of performing his duty, some of which were safe, the plaintiff chose one less safe or more dangerous, then you will take this

circumstance into consideration with all the other facts in the case, in deciding whether the plaintiff was at fault or not. It is for you to determine from the evidence whether plaintiff took the risk in getting off."

(21.) Because the court refused to instruct the jury as follows: " If you believe from the evidence that skids were kept between the main and side tracks before and at the time plaintiff was employed by the defendant, and if you believe they were necessary in order to perform the work of discharging or receiving freight, then the plaintiff assumed the risk of the premises as he found them."

(22.) Because the court instructed the jury as follows: " If you believe from the evidence that skids or planks were placed on or near the track of defendant's road where the injury complained of occurred, and that such planks or skids occasioned said injury to the plaintiff while performing his duties in obedience to orders and without fault or neglect on his part, then I charge you the defendant would be liable."

(23.) Because the court charged as follows: " If the conductor directed the plaintiff to get off the train while it was in motion, and he got off while in the performance of his duty as he was directed to do, then the defendant is estopped to deny the plaintiff's right to get off, and cannot set up as a part of his defense the claim that plaintiff was not bound to obey the conductor's orders."

(24.) Because the court charged as follows: " If it appears from the plaintiff's evidence that defendant was negligent, the onus is on the defendant to show that the plaintiff is also at fault, in order to defeat a recovery."

(25.) Because the court charged as follows: " If the plaintiff has shown that he was not at fault, then the defendant must show that the injury did not result from the want of ordinary and reasonable care on the part of his servants and agents."

(26.) Because the court charged as follows: " If the exercise of ordinary care and diligence required the defendant's agents and servants to place the skids, after using them, on the platform or some other place than the point where they were left, and if the defendant's agents and servants neglected to do so, and left the skids on the ground between the tracks at the point where the plaintiff got off, and if this was not the usual and also a proper place to leave the skids, or if they were placed in an

unusual or negligent position there, then the plaintiff, if he was injured by reason thereof, and was without fault, would be entitled to recover;” — there being no evidence to warrant such charge.

(27.) Because the court charged as follows: “ Special damages are such as actually flow from the act, and must be proved in order to be recovered, such as the surgeon’s or doctor’s bills, the cost of nursing and medicines; ” — there being no testimony to warrant such charge.

The motion for a new trial was overruled and defendant excepted.

A. R. LAWTON, JOHN I. HALL and J. J. HUNT, for the Central Railroad.

HARRISON & PEEPLES and J. F. REDDING, for plaintiff.

Blandford, J., delivered the opinion of the court affirming the judgment, and in the first division of the decision stated the facts as follows:

“ The evidence shows that the plaintiff was employed as a special or extra train-hand to run on defendant’s cars at night from Atlanta to Macon; that his business was to put on and off brakes, to couple and uncouple cars; that this particular train was on that night engaged in making up a train by picking up such cars along the route as were to be carried to Macon; that when the train was approaching Barnesville, and near there, while the train was moving at the speed of from four to six miles per hour, the plaintiff was directed by the conductor to get off of the train with him and go to the side track near the depot at Barnesville, on which several cars were placed, for the purpose of coupling them to the running train, when it should be backed for that purpose; that plaintiff used the lamp which he had, and got from the train carefully, but in alighting, his feet came in contact with two pieces of timber which were lying crosswise on the roadway of defendant; these timbers were known as ‘ skids ’ which were used by defendant’s agents in loading and unloading freight from their cars. The timber on which his feet rested upon alighting from the train turned and threw him against the running train, whereby he was greatly hurt, bruised, and his right hand became so badly mashed and mangled that the same had to be amputated above the wrist; and that a second amputation became necessary of the bone of the arm; that his pain and suffering was very great. It also appeared that the conductor

had preceded plaintiff, and had got off the train in safety. That this accident and injury to the plaintiff was wholly due to the skids or pieces of timber being left on defendant's roadway, there can be no doubt; and the court left it fairly to the jury to say, from the evidence submitted to them, whether the defendant, in leaving this timber upon its roadway, was negligent or not. The jury found that the defendant was negligent in so leaving this timber upon its roadway, and we are satisfied with this finding." \* \* \*

[The points decided are sufficiently set forth in the official syllabus and the statement of defendant's exceptions.]

EMPLOYEE'S HAND CRUSHED BETWEEN BUMPERS WHILE COUPLING CARS — ERRONEOUS CHARGE — RULES AND REGULATIONS. — In PORT ROYAL AND WESTERN CAROLINA RAILWAY CO. v. DAVIS, 95 Ga. 292 (October Term, 1894), train hand injured while coupling cars, judgment for plaintiff was *reversed* on the following grounds (as per the official syllabus):

" 1. Where an employee of a railroad company sues for personal injuries, a request to charge the jury to the effect that the omission of the plaintiff to perform a particular duty, or that the plaintiff in attempting to discharge the duty committed an error of judgment resulting in his injury, would defeat a recovery, the request leaving out of consideration entirely the question as to whether with respect to either proposition the plaintiff was negligent, was properly refused.

" 2. While, in the abstract, it is the duty of a railroad company to carefully select and superintend its operatives, machinery, appliances and appointments of every character used in its business, yet where the failure to properly select or superintend its operatives is not made a ground of complaint in the declaration, and the negligence imputed to the company is confined to the improper selection of machinery and appliances, it is error, at the request of the plaintiff's counsel, to give in charge the abstract principle of law first above stated, without limiting its application to the subject complained of in the declaration.

" 3. Where rules are prescribed or regulations adopted for the government of employees in and about the discharge of their duties, it is the duty of the employer to give notice of their existence and so to promulgate them as to afford to the employee a reasonable opportunity of ascertaining their terms. Knowledge, either express or such as the law will imply, without reference to the means by

which it is imparted, binds the employee to compliance. Therefore, a request to charge to the effect that if the rules be *written or printed*, each employee should either be furnished with a copy or advised as to where he can read or hear them read, and which leaves out of consideration all other means of acquiring knowledge, should have been denied; and the court in giving such instruction erred.

" 4. In the trial of an action for injuries alleged to have been occasioned to an employee of a railroad company in coupling cars, it was error to charge that, if the employee was instructed by the conductor to couple the cars without a knife or stick and when about to enter upon the discharge of that duty the conductor was in a position to see that he had no knife or stick and allowed him to proceed without them, and the employee was then and there injured, he was not negligent in not having such knife or stick, and was entitled to recover if injured without fault on his part and by the negligence and carelessness of the agents of the company.

" 5. Courts should not permit counsel in the argument of one cause to refer to positions and arguments of opposing counsel in another, with a view (or which might have the effect) to prejudice, disparage or discredit the sincerity of his position assumed in the case being tried; but such matters are to a great extent within the discretion of the presiding judge, and unless in the exercise thereof prejudicial error has been committed, this court will not interfere."

Plaintiff was a train-hand in defendant's employ, and while coupling cars his right hand was caught and crushed between the bumpers. He had a verdict in the City Court of Richmond county which, however, on appeal, was *reversed*. The points decided are stated in the foregoing syllabus.

**EMPLOYEE INJURED BY SUDDEN JERK OF ENGINE WHILE COUPLING CARS — INCOMPETENCY OF FIREMAN RUNNING ENGINE — KNOWLEDGE BY EMPLOYEE.** — In **RICHMOND & DANVILLE R. R. CO. v. WORLEY**, 92 Ga. 84 (1893), judgment for plaintiff in the City Court of Atlanta was *reversed* on the following grounds as stated in the official syllabus:

" 2. The inexperience and consequent incompetency of a fireman to properly handle and run a locomotive will not subject the railroad company to an action for a personal injury resulting therefrom to another employee who, knowing of the inexperience of the fireman, made no objection to serve with him in passing over a switch and

entering a siding for the purpose of connecting the locomotive with cars standing thereon. As the plaintiff admitted in his testimony on the stand that he knew of the fireman's inexperience, this put that ground of the action out of the case, and the court should not have submitted it to the jury as a possible basis of recovery.

"3. There was not enough evidence that the locomotive was out of safe order, or that its condition caused or contributed to the injury, to warrant the court in submitting that issue to the jury as a basis of recovery. The case should have turned alone upon the questions, whether the fireman was or was not negligent in working the locomotive, whether that negligence occasioned the injury, and whether the plaintiff was in the exercise of due care for his own safety." [Personal injuries: Hand injured and loss of fingers caused by plaintiff being thrown from footboard of engine by sudden jerk of engine.]

EMPLOYEE INJURED COUPLING CARS — CONTRACT OF EMPLOYMENT — DAMAGES — QUESTION FOR JURY. — In *CARLTON v. WESTERN & ATLANTIC R. R. CO.*, 81 Ga. 531 (1888), employee injured while coupling cars, judgment in the City Court of Atlanta was *reversed*, the third paragraph of the official syllabus to the report stating the case as follows:

"Where, by contract between defendant and plaintiff, who was its employee, in case plaintiff should be hurt while in its service by its negligence, etc., it was provided that, where the injury was not permanent plaintiff should be paid wages until he was able to work, for not exceeding six months, and where the injury was permanent but did not result in the loss of a limb, his measure of damages, including wages while at work, should not exceed \$500, etc.; and where plaintiff, being injured but not losing a limb, signed a receipt for \$32.50 'in full of all wages due me to date, and in full for all damage which I may have sustained on account of said injury,' it appearing that the injury occurred February 17, 1886, and the receipt signed March 19, 1886, it was error to charge that the legal effect of the contract of settlement barred plaintiff's right to recover. It does not appear that his wages were in dispute, and he received wages for only a month while he appears, under the contract, to have been entitled to more. Any agreement on his part to receive his wages in satisfaction of damages would be a *nudum pactum* and would not bar his recovery. It does not appear that he received anything for his damages. It should have been left to the jury to determine whether the wages as well as the damages were in dispute and whether the settlement covered all."

EMPLOYEE INJURED COUPLING CARS — DAMAGES — EVIDENCE — QUESTION FOR JURY — CHARGE — CONTRIBUTORY NEGLIGENCE — BURDEN OF PROOF — In **CENTRAL R. R. & BANKING CO. v. KELLY**, 58 Ga. 107 (*January Term, 1887*), employee injured while coupling cars, judgment for plaintiff for \$3,000 rendered on verdict in the Jefferson Superior Conrt was reversed on the following grounds set out in the official syllabus (as per opinion rendered by JACKSON, J.):

" 1. The opinion of the plaintiff that the damage from the crushing of his hand, caused by the coupling of cars, was in round numbers \$10,000 — the sum he had sued for — was improperly admitted in evidence to the jury. What influence it may have had upon the jury, in making their verdict, cannot be estimated ; that it had some influence is certainly quite probable, though the verdict of the jury was \$3,000 and not \$10,000, and though no witness but the plaintiff made an estimate of the damage.

" 2. The damage is to be fixed by the jury, according to their opinion derived from facts testified to, such as the loss of the use of such a member of the body as the right hand, the diminution of ability in a laboring man to make a living after such loss, the pain and suffering caused by the wound, the bill of the physician and the expense of nursing, and all other facts and circumstances connected with the case: and this opinion of the jury should be influenced by the opinion of no witness, given in round numbers, of the amount of the damage, but made up from facts when capable of proof, of actual damage, and of the enlightened conscientious belief of impartial jurors in respect to items incapable of exact proof, such as the feelings, the pain and suffering of the plaintiff, etc.

" 3. The sayings of the conductor to the fireman at the next station are inadmissible, particularly when offered as evidence for the company

" 4. There was no error in refusing to charge that ' when a party contracts to perform a service which, from its very nature, is attended with more than ordinary risk, he must take the consequences himself, and can only look to his employers when the latter, through itself or agents, has unnecessarily, improperly, or in an unusual manner, exposed him to danger that ought to have been avoided ; ' nor in refusing to charge ' that the jury should inquire whether a prudent, cautious man, with full use of both hands, could have coupled the cars at that time without injury or accident to himself, and if so, the plaintiff is not entitled to recover ' The questions are the fault of the plaintiff and the negligence of the company without regard to the nature of the business or the condition of the

plaintiff's hands. If the business was very dangerous, the duty was upon both parties to use the more care and diligence; if there was a defect in the left hand of the plaintiff, the defendant should have noticed the patent defect before employing him about such work. In both cases the responsibility was equally balanced, and the general principle of law was unaffected.

"5. The presumption of law that the plaintiff, being an employee, is without fault, arises only when he is wholly disconnected with the duties about the particular business in which he was hurt; when he is a party engaged in the duty in discharging which he is hurt, the *onus* is upon him to show himself without fault; so soon as he does that, the presumption arises that the other employees engaged with him in the duty were at fault or negligent, and the *onus* is shifted upon the company to show them without negligence; and this principle reconciles the cases decided by this court, when applied to the facts of each.

"6. A new trial being granted on the sole ground that the court admitted in evidence the opinion of plaintiff that he was damaged, and ought to recover \$10,000, it is considered improper to express any opinion on the merits of the case in respect to the weight of the evidence on the question of fault in the plaintiff and negligence in the defendant, or in regard to the amount of damages, whether excessive or not."

CAR-REPAIRER KILLED BY SWITCH-ENGINE STRIKING CAR — PLEADING — AMENDMENT — DECLARATIONS — EVIDENCE — RULES — CONTRIBUTORY NEGLIGENCE. — CENTRAL R. R. & BANKING CO. v. KITCHENS, 83 Ga. 83 (1889), was an action for the negligent killing of plaintiff's husband who while working under a car in obedience to orders of another employee, alleged to be the injured employee's superior, was fatally injured by a switch-engine striking the car. Plaintiff recovered a judgment in the City Court of Macon for \$350 which, on appeal, was reversed, the official syllabus stating the rulings as follows:

"1. Homicide being alleged, the mode of committing it may be particularly specified by amendment without adding a new cause of action.

"2. Though declarations be no part of the *res gestae*, their admission in evidence, unless objected to on the proper ground, is no cause for a new trial.

"3. A rule of a railroad company applicable alike to all persons of a given class, is not to be evaded by the failure of one person of the class to observe the rule, when another person of the same class

is injured thereby. [Citing *Ga. R. R. & B. Co. v. McDade*, 59 Ga. 73, reported in this volume of Am. Neg. Cas., *post.*]

" 4. Negligence is a question for the jury.

" 5. An employee of a railroad company being himself at fault and thus contributing to his death, his widow cannot recover." [The homicide resulted from failure of plaintiff's husband to observe a rule of the road requiring him to display a signal when at work under a car.]

CAR REPAIRER THROWN FROM LADDER ON CAR ON WHICH HE WAS WORKING CAUSED BY ENGINE STRIKING CAR.—In *RICHMOND & DANVILLE R. R. CO. v. DAVIS*, 86 Ga. 76 (*October Term, 1890*), car repairer killed, judgment for plaintiff was *affirmed*, the official syllabus stating the case as follows: "The action being to recover damages for the homicide of the plaintiff's husband, alleged to have been caused by the negligence of the servants of the railroad company in moving an engine against a car upon which he was at work, by which he was thrown from a ladder and injured so that he died, and the evidence being conflicting upon whether his death was caused by the injury so received or by a disease not consequent upon that injury, and the jury having been properly instructed as to the law governing the case, and having found in favor of the plaintiff, and there being sufficient evidence to authorize the verdict, and the court below being satisfied not to disturb it, this court will not interpose to grant a new trial."

CONDUCTOR INJURED WHILE FLAGGING TRAIN—DEFECTIVE CROSS-TIE—PROXIMATE CAUSE.—In *EAST TENNESSEE, VIRGINIA & GEORGIA R'Y CO. v. REYNOLDS*, 93 Ga. 570 (*March, 1894*), conductor injured while trying to flag a train, judgment for plaintiff in the Whitfield Superior Court was *reversed*. The official syllabus states the case as follows: "Although the coming apart of the train, and the running back of a portion of it, may have been the result of the engineer's negligence, and have made it necessary for the engineer to go back and flag an approaching train, yet, as the immediate and proximate cause of his injury was his slipping and falling upon a cross-tie forming a part of the trestle, the injury was a mere casualty incident to the business in which the plaintiff was engaged, and he was not entitled to recover. This is true, although there was upon the edge of the cross-tie a small bit of decayed sap, the breaking of which from the tie itself caused the plaintiff's fall. There was no negligence of the company, relatively to the plaintiff, in having a defective cross-tie, the

purpose of having ties not being to make a way for employees to walk upon, but to make a safe road-bed for the running of trains."

In the Reynolds case, *supra*, the court distinguished the case of *Simmons v. East Tenn., Va. & Ga. R'y Co.*, 92 Ga. 658, from the facts in the Reynolds case. [See 14 Am. Neg. Cas. 83, *ante*.]

**CONDUCTOR INJURED BY DERAILMENT OF FREIGHT TRAIN — DAMAGES.** — In **GEORGIA PACIFIC R'Y CO. V. DOOLEY**, 86 Ga. 294 (1890), conductor of freight train injured by derailment of train, judgment for plaintiff in the Fulton Superior Court for \$16,044 was *affirmed*. The facts were as follows: Plaintiff was conductor of defendant's freight train at the time of the injury, which was caused by the cars leaving the track in Alabama, on account of its defective condition. He was in his thirty-third year, was receiving wages of \$70 per month, and was stout and healthy. He was thrown out of the caboose to the ground, whereby his heart was displaced, his shoulder was so dislocated that he lost the use of his arm and it is wasting away, his jaw-bone was broken, five of his teeth were knocked out and he cannot close his front teeth to properly masticate his food, his head, side and thigh were cut, and his leg and hand were skinned. The heart displacement impairs its action and prevents proper circulation of the blood, rendering it dangerous for him to engage in manual labor requiring exertion, or in occupations which he followed before the injury. His weight decreased thirty-five pounds. The heart trouble has increased. He cannot earn more than \$20 per month. At the first trial, March 20, 1889, the verdict was for \$15,000 in his favor; at the second, March 14, 1890, the jury found for him \$16,044. The syllabus to the official report states the points decided (per **SIMMONS, J.**) as follows:

"1. The servant of a railroad company to whom has been delivered a printed copy of its rules governing his conduct as a servant, and who can read and has had sufficient time to become acquainted with them, is bound by every reasonable one which is to govern his conduct while in the service, whether he has read or has knowledge of it or not. But he is not bound by a rule which requires him to waive rights not connected with his duty as a servant, although he knew of it, unless he has expressly agreed to it; especially where it requires that the officer employing him shall have it distinctly understood and agreed to by him, and nothing is said to him about it.

"2. Evidence as to the road beds of other railroads in Alabama being inadmissible, qualification of the charge by reference to such other road beds could not be made.

" 3. The better practice, where either party so requests, is to detach from the declaration before it is handed to the jury the verdict rendered on a former trial, or in some way conceal it. But it appearing by the affidavits of eight of the jurors (the other four being inaccessible) that the former verdict was not known or read by them until after the present one had been agreed upon and signed, it is the same as though the former one had not been delivered to them.

" 4. The verdict for \$16,044 damages is sustained by the evidence, and is not excessive under the facts."

**CONDUCTOR INJURED BY GIVING WAY OF DEFECTIVE LADDER ON CAR — LAW OF PLACE -- STATUTE — COMMON LAW.** — In **ATLANTA & CHARLOTTE AIR LINE R'Y CO. v. TANNER**, 68 Ga. 384 (1882), conductor of freight-train ascending ladder on car precipitated to the ground by reason of giving way of defective round of ladder, causing train to run over his leg, necessitating amputation, judgment for plaintiff for \$9,000 in the Fulton Superior Court was *affirmed*. The official syllabus to the report states the points decided as follows:

" 1. Where the contract for service as conductor on a railroad through different States is made at the terminus in one State wherein is the office of the company, and the injury to the conductor occurs in another State, on a suit for damages by the conductor, does the law of the place of the contract or of the place of the hurt govern, the negligence charged being mainly the neglect of properly inspecting the machinery of the train at the point where the contract was made? *Query.* [Citing *Dyke v. Erie R'y Co.*, 45 N. Y. 113; *Selma, R. & D. R. Co. v. Lacy*, 49 Ga. 107.] (1)

1. In *DYKE v. ERIE R'y Co.*, 45 N. Y. 113 (1871), where plaintiff, a passenger on defendant's road, was injured in accident happening on point on defendant's road in the state of Pennsylvania, it was held that the laws of Pennsylvania limiting amount of damages in that state to \$3,000, did not apply to action brought by passenger in New York, and judgment for plaintiff for \$35,000 was affirmed.

In *SELMA, ROME & DALTON R. R. Co. v. Lacy*, 43 Ga. 461 (1871), an action instituted by plaintiff in the courts of this state (Georgia) to recover damages for death of her husband alleged to have been killed by defendant in the

state of Alabama, brought under section 2920 of the Code, it was held "that the action could not be maintained in the courts of this state, for the injury alleged to have been done within the territory of the state of Alabama, without an allegation in the declaration that the laws of that state were similar to our own in relation to the injury complained of; that in the absence of any such allegation, the courts of this state will presume that the common-law is of force in that state; that our statute has no extra-territorial operation." Plaintiff's husband was killed by alleged careless running of defendant's engines and cars. [49 Ga. 107.]

"2. Assuming that the law of the place of the hurt is the law of the case, the law of South Carolina, and not of Georgia, will be applied by the courts of Georgia to the cause when tried in this State, except in so far as mere modes of procedure and matters of practice in court are concerned.

"3. There being no statute regulating the rights of parties in such cases in South Carolina, and the common law prevailing there, the courts here, in a liberal spirit of comity, will apply the construction of the common law in that State by its highest judicial tribunal to the facts of the pending case. So applying the principles there decided to this case, the court below did not err to the prejudice of the plaintiff in error, and it cannot complain. [Gunter v. Graniteville Mfg. Co., 15 S. C. 443, 18 S. C. 262.]

"4. In all judicial proceedings in this State, facts are for the jury, and there being evidence enough to support the verdict, and the true facts as found by the jury making a case recoverable under the common law as generally understood and ruled wherever that system prevails, and not at variance with the latest adjudications in South Carolina, and the presiding judge having approved the findings of the jury, our rule of practice in this State is that this court will not interfere except in cases of abuse of discretion. In this case it has not been abused." [Citing Selma, Rome & Dalton R. R. Co. v. Lacy, 49 Ga. 107.]

CONDUCTOR INJURED WHILE UNCOUPLING CARS.—In CENTRAL R. R. AND BANKING CO. v. SEARS, 59 Ga. 436 (*August Term, 1877*), conductor of freight train killed while attempting to uncouple cars due to moving of train, judgment for plaintiff for \$8,750 in the Spaulding Superior Court was *reversed* (1). The grounds of reversal are stated in the official syllabus to the report as follows:

i. On the former appeal in the SEARS case, where there was a judgment for the plaintiff for \$10,000, but a new trial granted on the ground of excessive damages, from which judgment plaintiff appealed, judgment was *affirmed*. See SEARS v. CENTRAL R. R. & BANKING CO., 53 Ga. 630 (1875).

On a subsequent trial of the SEARS case there was a verdict for plaintiff for \$8,500. Defendant appealed. *Judgment reversed*. It was held that "where an emergency is relied upon as justifying a conductor in going out of his sphere and taking upon himself the duty and hazards of a subordinate, and it is alleged that the emergency was occasioned by the train being behind time, it is incumbent upon the conductor, or those claiming through him, to make it clearly appear by evidence that the delay of the train was not caused by his fault or negligence." See CENTRAL RAILROAD v. SEARS, 61 Ga. 279 (1878).

" 1. Though recitals of facts in the grounds of the motion for a new trial be not sufficiently certified as true in the bill of exceptions, yet if the record shows by the judge's indorsement on the motion that they are 'approved' by him, such approval is a sufficient verification.

" 2. Where the question is in respect to the fault of the husband of plaintiff, for whose homicide she sued, or that of the engineer, warnings of the engineer to the conductor, who was the deceased husband, in regard to his imprudence in transactions similar to that which resulted in his death, are admissible in evidence.

" 3. The presumption of law, that the plaintiff's husband, being an employee of the road, is without fault, arises only when he is disconnected with duties about the particular business which resulted in his hurt; if he himself was engaged in the very act which resulted in his death, no such presumption will arise, but the onus is upon the plaintiff to show either that her husband was without fault, or that the company's other employees were at fault, before the onus is shifted on the company to defend (1).

" 4. When the ordinary duties of a conductor do not include the duty to couple and uncouple cars, according to the evidence, he is outside of duty and at fault, unless there be a pressing emergency upon him to do that work; and the court should present this proposition distinctly to the jury.

" 5. If the conductor believed, in good faith, that such an emergency was upon him, and the jury so find, and that he had good reasons so to believe, then the mere act of coupling and uncoupling, or attempting it, will not be outside of his duty and make him to blame; but even if it should appear that he thought, and had reason to think, that the emergency was upon him, he would be at fault if he acted recklessly or imprudently; and whether he did so or not is for the jury to say, under all the facts of the transaction.

" 6. As the verdict seems to us against the weight of the evidence, we are less reluctant to require a third trial of this case."

[A former decision of the Sears case, *supra*, is reported in 53 Ga. 630, where it was held "not to be the duty of plaintiff's husband, as the conductor of defendant's train, to couple and uncouple cars, unless in case of a pressing emergency." See also 61 Ga. 279.]

1. This point seems to have been almost exactly ruled by the court in *Central R. R. & Banking Co. v. Kelly*, 58 Ga. 107 (see headnote 5 in that case); and see also *Central R. R. & Banking Co. v. Kenney*, 58 Ga. 485, for a similar ruling, both of which cases are reported in this volume of AM. NEG. CAS.

**COOPER v. MULLINS (SUPERINTENDENT OF THE  
WESTERN AND ATLANTIC RAILROAD).**

*Supreme Court, Georgia, March Term, 1860.*

[Reported in 30 Ga. 146.]

1. **FELLOW-SERVANT RULE.** — The doctrine that servants of the same master cannot have redress against the master, for the consequences of each other's negligence in his service, being founded upon the policy of making each servant interested in the good conduct of the rest, cannot apply to a case where the respective situations of the servants allow no opportunity for the exertion of a mutual influence upon each other's carefulness.
2. **DAMAGES.** — Pecuniary injury is not the only one for which compensation ought to be allowed in damages.
3. **SETTING ASIDE VERDICT — PRACTICE.** — A verdict will not be set aside as contrary to evidence, because it may conflict with the conclusions of a witness who drew his conclusions from the interchange of signs between himself and another person, and who testifies under a strong motive to support those conclusions.

[Action by an engineer for injuries sustained in a collision of trains.]

CASE, in Fulton Superior Court. Tried before Judge Bull, at April Term, 1857. Judgment for plaintiff for \$3,500 *affirmed*.

This was an action brought by James Mullins against James F. Cooper, superintendent of the Western and Atlantic Railroad, to recover damages for an injury, received by the plaintiff, and resulting from a collision of trains running on said road.

Plaintiff proved by the attending physicians the nature and extent of the injury he received; that his left arm was broken in several places; the elbow was seriously and materially injured; that the injury was received in September, 1855, and that he was confined, by reason of said wounds, till the last of December thereafter; his elbow joint was still (at the time of the trial) stiff, and incurable in that respect; Dr. Dearing's bill for attention was about twenty-five dollars.

Plaintiff further proved, that he was in the employment of the Georgia Railroad, at the time of the injury, as an engineer; that he was formerly a machinist, and that he was incapacitated, by reason of said injury, for a machinist, but not for an engineer, but that he could not, as an engineer, be able to *reverse* an engine so promptly as before.

The circumstances under which the plaintiff went upon the

Western and Atlantic Railroad, upon the occasion of receiving the injury, were as follows:

The machinist of the Georgia Railroad shop, in the city of Atlanta, was applied to by an officer of the Western and Atlantic Railroad for an engine and engineer, to go up the Western and Atlantic road, to bring down from Chattanooga a train of cars, as that road did not have sufficient motive power to bring down the cars, which belonged to the Georgia road, as fast as they were needed below; said officer saying that he wanted an engine and engineer to make a trip up the road after them. In consequence of this application, Mullins was sent up the road with an engine, with instructions from the Georgia Railroad to bring down only empty cars belonging to the Georgia Railroad. Plaintiff was willing to go, and was selected because he knew the Western and Atlantic road, having made similar trips before. There was a general agreement between the two roads that such service was to be paid for, and for similar services before rendered, the Georgia road had been paid by the Western and Atlantic road. This trip was not a gratuity; Georgia road expected to be paid for the trip; plaintiff, while making this trip, was subject alone to the orders of the officers and agent of the Western and Atlantic road.

Plaintiff further proved by the witness, Bruner, that, in making the trip under the circumstances above stated, on his return down with the cars, when about forty miles from where the accident occurred, he got behind with his train on account of his engine *foaming* (there seemed to be several trains coming down at the same time), and was, therefore, not suited to run in front. The witness, who was engineer of the front train, displayed a flag, which indicated that another train was following — a signal well known to railroad men. Plaintiff's train had the right to the track, even if he had been three hours behind the schedule time, the flag having preceded him; he was only about twenty-five minutes out of time when witness left him. There was no rule of the road which required regular trains which might be out of time, to stop; the rule required other trains to wait for them and to keep the track clear. Plaintiff's train consisted of Georgia Railroad cars and a caboose belonging to the Western and Atlantic road, and he was accompanied on the trip by a conductor of the Western and Atlantic road, whose business it was to regulate the running of the train.

Plaintiff having closed, defendant read the depositions of Henry G. Cole, taken by commission, who deposed: That he had control of the engine and train at the Etowah embankment, in September, 1855; the engine and train were used for hauling earth into the embankment at the Etowah river; deponent and Kendrick were the contractors for said work; it was their daily practice to send the earth train after water to the station, about three miles and a half from the works; usually sent it after the express train; on the day of the collision, two express trains passed at schedule time, and we waited one hour and a half for the third, and finding our water was giving out, the engine was sent to the station for water; about fifteen minutes after it started, witness saw the train, of which Mullins was engineer, approaching; witness immediately took position at a conspicuous place near the track, and several times made the usual sign for stopping trains, called to the engineer and pointed to the pit, to show him that the earth train engine was not there; as he passed, witness called aloud and told him that the way engine was on the track; plaintiff made a sign with his hand which witness understood to mean that he would run the earth engine to Altoona siding. The sign made for stopping plaintiff was the usual sign for stopping trains. Plaintiff disregarded the signal, and his engine and the earth engine came together about three miles from the embankment. Witness walked to the place when he heard the collision, thinks neither engine was thrown from the track. The earth engine belonged to the Western and Atlantic railroad, but was controlled by the contractors for doing the work at the embankment; don't think the engineers would have been hurt if they had remained on the engines.

The testimony being closed, counsel for defendant requested the court to charge the jury, that if plaintiff had hired himself to the Georgia Railroad, and that road had with his consent hired him to the defendant for the services in which he was employed at the time he received the injury, then plaintiff was the servant of defendant. That such contract need not be an *express* one; if in the usual course of dealing between them it had been customary for a compensation to be made for such services, then the law would imply a contract in the absence of proof of an express contract, and of any stipulation to the contrary. Which charge the court gave with this qualification, to-wit: "But if the plaintiff was in the employment of the

Georgia railroad, and engaged in the business of that road for its benefit, and paid by that road for his services, the fact that he, during that trip, was subject to the orders of defendant, or its officers, and the fact that defendant paid the Georgia railroad for said services, would not constitute plaintiff the servant of defendant in such sense as would bar his right to recover for injuries he received by the gross neglect and misconduct of the officers or employees of defendant, committed by them in the service of defendant. To which charge counsel for defendant excepted.

The court, amongst other things, further charged the jury, that to entitle plaintiff to recover, it was not necessary for him to prove any specific pecuniary damages, but that they could find such damages (if any) as under all the circumstances of the case, and the extent and nature of the injuries, they thought he was entitled to, but that they could not in this case give vindictive damages — counsel for defendant having requested him to charge that before plaintiff could recover, it was necessary for him to prove some pecuniary damages. To which charges and refusal to charge, counsel for defendant excepted.

The jury found for the plaintiff \$3,500. Whereupon counsel for defendant moved for a new trial on the grounds of error in the charges and refusals to charge as above stated, and because the verdict was contrary to law and the evidence, and the damages found thereby excessive. The court overruled the motion for a new trial, and counsel for defendant excepted and assigned said refusal as error.

GLENN & COOPER, and BLECKLEY, for plaintiff in error.

J. M. CALHOUN & WM. EZZARD, for defendant in error.

**Stephens, J.** — 1. The general rule is, that whoever is injured by the negligence of a servant in his master's business, is entitled to redress from the master. The railroad, in this case, claims an exception against other servants of the same master. Such an exception has been recognized in some modern cases, but when confined within the reason on which it is founded, it can have no application to this case. That reason is one of public policy to secure to the public a more faithful service from employees on railroads, steamboats, and other branches of business wherein the safety and property of the public are involved, by making it the interest of each one of such employees to look after and

encourage the carefulness and fidelity of all the rest. This reason can have no application to employees whose situations allow them no connective influence over each other. The exception operates as a penalty, and to impose the penalty when there is no opportunity of exercising that supervising care which it is intended to enforce, is sheer cruelty. In the case of *Scudder v. Woodbridge*, 1 Ga. 195, this court held that the exception did not extend to *slaves*, because slaves from their *status* were incapable of influencing their associate employees towards fidelity and care in the common business (1). Nor can it be extended to other employees who from *any cause* are not in a situation to exert such an influence on their fellows. It follows, therefore,

1. In *SCUDDER v. WOODBRIDGE*, 1 Ga. [1 Kelly] 195 (1846), it was held that the doctrine that the principal is not liable to one agent or employee for damages occasioned by the negligence or misconduct of another agent or employee, is not applicable to slaves. In this case it appeared that Wally Woodbridge brought an action on the case against Amos Scudder, to recover the value of a negro boy, by the name of Ned, a carpenter, killed on board the Ivanhoe, owned by the defendant, it being alleged that the property [slave] was lost through the carelessness of the captain of the boat who was employed by the owner, whereby the boy became entangled in the water-wheel of the boat and was drowned. On the trial in the Chatham Superior Court the jury returned a verdict for \$500, from which defendant appealed. The Supreme Court *affirmed* the judgment, holding that the employee of a slave is liable in damages to the owner, if such a slave be killed or injured, by the negligence or unskillfulness of other agents or employees engaged in the same service.

In *Gorman v. Campbell*, 14 Ga. 137 (1853), it was held that the hirer of a slave is not liable for the loss of his life in the service for which he was employed, unless guilty of wilful misconduct or culpable negligence. But

where a slave is put to a different purpose from what was intended, the hirer is responsible for his loss of life, although by inevitable casualty, and although the loss arose from the voluntary act of the slave. Action to recover damages from Campbell for loss of plaintiff's slave hired to work on board defendant's steamboat for a certain purpose, but who, in voluntarily doing other work, lost his hat, and in attempting to recover it, fell into the water and was drowned. There was a verdict for defendant in the Bibb Superior Court which, on appeal, was *reversed*.

In *Lewis v. McAfee*, 32 Ga. 465 (1861), judgment for plaintiff for \$1,200 in the Fulton Circuit Court was *affirmed*. The action was for the death of a negro hired by McAfee to the Western and Atlantic Railroad, who was killed by leaping from a rapidly moving train. It was held that "if a negro be hired to a railroad for a particular service, and he is used by the road for a different purpose or service from that intended, and an accident happens to him in the performance of such service that causes his death, the road is liable to the owner for his value. Most especially is this so, when such accident results from the gross neglect and mismanagement on the part of the employees of the road."

that the cases to which this exception applies, are only those where the servant receiving the injury is engaged with the servant inflicting it, in a common business where he has an opportunity to exercise a preventive care over his negligence. In this case the person whose negligence produced the injury was on the train of cars, and the person who was injured was on *another train*, and had not the slightest possible opportunity of preventing the other's carelessness. To hold the employees on different trains of cars responsible for the carefulness of each other seems to me about as reasonable as it would be to exact such a mutual responsibility between employees on different railroads, or in different quarters of the earth, because they might happen to be all servants of the same master. The reason of the exception is to make such employee a help to the carefulness of the rest, and where that object cannot be accomplished, the exception ought to cease, and the general rule of giving redress against the master to everybody who may be injured by the negligence of his servant in the performance of his business ought to prevail. But it is not even true that the two employees in this case were servants of the same master. The argument of the case mainly turned on this point, and therefore I will devote a few words to it, though notice of it is rendered unnecessary by the preceding view. One of the engineers was in the pay of the Western and Atlantic railroad, and the other, Mullins, who was injured, was in the pay of the Georgia railroad, and at the very time when he was hurt was doing a job for which the Georgia railroad, and not himself, was to receive pay from the other road. The Georgia road furnished to the other an engine and engineer, that is to say, a team and driver for a single occasion.

Whose servant was that driver? In the case of *Laugher v. Pointer*, 5 Barn. & Cressw. 547, a stable-keeper had hired a team and driver to another person for a day, and the question was, whose servant was the driver? The Court of King's Bench was equally divided, but Judge Story, in a note to sec. 4536, of his work on Agency, says that all the subsequent cases have followed the opinion of those who held that the driver was the servant of him who had furnished him, and in whose pay he was, and not of him who had him but for a single occasion, who had no part in selecting him, and who was under no obligation to pay him. The parallel between that case and this seems to be complete.

For these reasons a majority of the court think that the doctrine relating to servants of the same master is not applicable to this case, and that the charge asked on it might have been refused instead of being merely modified as it was by the judge.

2. The errors assigned upon the refusal of the judge to charge that some *pecuniary* damage must be proven, and upon the excessiveness of the damages found, may be considered together, for the same view covers both. Surely, there ought to be some compensation for the *suffering* endured. The pain from the wounds must have been great, and the dread of the approaching collision between the two engines, though brief, must have been terrible. Mental agony has been known to turn a head gray in a night, and gray hairs are often but the effervescence of some great mental anguish. Shall all compensation be denied to such suffering merely because there can be no adequate compensation? We think not.

3. The ground that the verdict was contrary to the evidence rests upon its conflict with the testimony of Cole, tending to show that the accident was caused partly by negligence of the plaintiff himself. The engine which was in the wrong place had been put there by Cole's order, and he therefore testified under a strong motive to lighten the blame in that quarter and fix it upon Mullins. He made certain *signs* to Mullins, and Mullins made signs back to him, and the only important part of his testimony consists of the conclusions which he drew from Mullins' signs, as to the information which Mullins had got from his signs. Is it wonderful that the jury did not place implicit reliance upon such conclusions of a witness so situated?

Judgment affirmed.

## ROWLAND (SUPERINTENDENT OF THE WESTERN AND ATLANTIC RAILROAD) v. CANNON.

*Supreme Court, Georgia, December Term, 1866.*

[Reported in 35 Ga. 105.]

**ENGINEER KILLED IN COLLISION BETWEEN TRAINS — CONTRIBUTORY NEGLIGENCE.** — The widow of an employee of a railroad cannot recover for his loss of life, if by his own fault he contributed to the accident which occasioned his death.

So held in action for damages for death of locomotive engineer caused by a collision between the passenger train he was running and a freight train belonging to the same railroad (1).

APPEAL from judgment for plaintiff for \$4,000 in the Fulton Superior Court, and from refusal of trial court to grant new trial. *Judgment reversed.*

In July, 1862, Sylvester Cannon was in the employment of the Western and Atlantic Railroad as a locomotive engineer, and, on the Sabbath day, was running an engine attached to the regular passenger train from Atlanta to Chattanooga. It was unusual to run freight trains on the road on Sunday, and on this occasion there was no reason to expect that any train would be in Cannon's way, neither he nor the conductor of his train having been notified that any had been or would be sent out. In point of fact, however, a freight train was started out by the agent of the road at Chattanooga to go to Atlanta, and near Johnson's station it came in collision with Cannon's train, and he was killed. His widow brought suit against the road for damages. At the trial it appeared in evidence that by printed rules which

I. *Rowland v. Cannon*, 35 Ga. 105 (the case at bar) is referred to as the leading Georgia case on contributory negligence, and to which attention is particularly called by Mr. Justice Jackson in *Central R. R. Co. v. Mitchell*, 63 Ga. 173, 14 AM. NEG. CAS. 128, *post*.

See the following paragraphs relating to the history of *Rowland v. Cannon* (the case at bar):

In *CANNON v. ROWLAND* (Superintendent of the Western & Atlantic Railroad), 34 Ga. 422 (1866), dismissal of action in the Fulton Superior Court was reversed. In July, 1862, an engineer, while employed on the Western & Atlantic Railroad, was killed by the colliding of two trains. In March, 1863, his widow brought action to recover damages. Held, that under the provisions of the Act of April 18, 1863, the action was maintainable, the said Act superseding the Act of 1856 (which relieved the Western & Atlantic Railroad from its application). See *Walker v. Spullock*, 23 Ga. 436, for its ruling

relating to the Act of 1856, abstract of which case appears in the paragraph below.

Another trial of the *Cannon case* was held in the Fulton Superior Court, in which plaintiff recovered verdict for \$5,000, but this was reversed, on appeal, it being held that "when two or more parties are engaged in the same illegal transaction, in violation of the supreme law of the land, and one of them is injured by the carelessness or negligence of the other, the court will not lend its assistance in favor of either party to recover damages. The maxim of the law in all such cases is: "*In pari delicto potior est conditio defendantis et possidentis.*" See *WALLACE* (Superintendent of the Western & Atlantic Railroad) *v. CANNON*, 38 Ga. 199 (December Term, 1868).

It appeared that the Western & Atlantic Railroad, in the superintendence of the State of Georgia, was in the hands of persons engaged in insurrection against the government of the

were in the hands of all engineers, it was not allowable to run on that part of the road at a higher speed than eighteen miles per hour, and that Cannon, at the time of the collision, was running at the rate of twenty miles per hour; also, that if he had been running at but eighteen miles per hour, the collision would not have occurred at that place (which was on a sharp curve) and might not have occurred at all; that a quarter of a mile further towards Atlanta, the trains might have been seen by those upon them in time to prevent the accident, though still further on in that direction the result of a collision might have been much worse. It was in evidence that the rule restricting the speed to eighteen miles per hour had been made on account of the condition of the track on that part of the road, the iron being, when the rule was adopted, scrap iron, but that prior to this collision, it had been relaid with good iron, so as to become the best part of the road. The rule, however, had not been revoked. On some other parts of the road, a speed as high as twenty-eight miles per hour was allowed by the rules.

The trial court, after charging the jury that if the injury was caused exclusively by the fault or negligence of the plaintiff's husband, she would not be entitled to recover, and if caused exclusively by other employees of the road, she would be entitled to recover, added that if both parties were in fault, the plaintiff might still recover, but the jury should find such damages as they thought the plaintiff entitled to under the circumstances in proof.

The jury found for the plaintiff \$4,000. Defendant moved for a

United States, and that plaintiff's intestate was, by acting and serving as engineer on said railroad, unlawfully aiding and abetting the enemies of the United States.

In *WALKER v. SPULLOCK* (Superintendent of the Western & Atlantic Railroad), 23 Ga. 436 (1857), an action brought by the widow Walker to recover damages for the death of her husband, an employee of defendant, caused, as alleged, by negligence of other employees, dismissal of action was affirmed. It was held in this case that the Act of March 5, 1856, defining the liabilities of railroad companies for

injury to persons or property, prescribing counties where they may be sued, and form of service of process, did not apply to the Western & Atlantic Railroad.

The Code, sections 889-890, which went into effect January 1, 1863, makes the State occupy the same relation to this road, as owner, that any company does to its railroad, with corresponding obligations and liabilities; and the Act of April, 1863, declared the laws regulating the liabilities of railroad companies for damages for injuries, etc., applied equally to the Western & Atlantic Railroad.

a new trial on the ground of error in that part of the charge which recognized the plaintiff's right to recover if both parties were in fault. The court refused a new trial, and that refusal is the error alleged.

MYNATT and BLECKLEY, for plaintiff in error.

BAUGH and HOYT, for defendant in error.

**Lumpkin, Ch. J.** — The single question in this case is: Can the widow of an employee of the State Road, if he is killed, recover damages for his loss of life, provided he, himself, is guilty, in part, of the accident which caused his death?

It is well settled, that a passenger or third person may recover, though he is partly to blame for the casualty. Does the same rule apply to agents of the road? This depends upon the proper construction of the following sections of the Code. Sections 2054, 2979, 2980 — particularly the last of these sections, which reads as follows: "If the person injured is himself an employee of the company, and the damage was caused by another employee, and without fault or negligence on the part of the person injured, his employment by the company shall be no bar to the recovery." From these sections it would seem that if the person injured is himself an employee of the company, and the damage was caused by another employee, without fault or negligence on the part of the person injured, his employment by the company would be no bar to the recovery, and, therefore, negatively, that it would constitute a bar if fault or negligence be imputable to him. The conclusion seems inevitable from the language of the Code; and is it not promotive of good thus to interpret the Code? The strictest fidelity should be exacted of all the agents; and to allow one to hold the road liable, when he himself contributed in part to the injury, seems to be wrong to the road and the people generally, who are indirectly, but deeply interested in the fidelity of the employees.

Now, it is conceded that Mr. Cannon, the engineer on one of the colliding trains, was partly to blame for running it at undue speed, and that, too, contrary to the printed rules of the superintendent, which he had in his pocket, and which are declared by the Code to be *laws*. Notwithstanding that other agents of the road were not guiltless, he participated in their violation of rules which are laws to them. Is it sound policy to allow him, or his family, to recover, when, by reason of this violation of law, several lives, I believe, were lost, and extensive injury

inflicted upon the machinery of the road? But it is not for us to reason about the matter. Such is the Code, and we must obey its behests; and, therefore, reverse the judgment of the court below.

Judgment reversed.

## GEORGIA RAILROAD & BANKING COMPANY V. McDADE.

*Supreme Court, Georgia, August Term, 1877.*

[Reported in 59 Ga. 73.]

- RULES AND REGULATIONS — TIME SCHEDULE — RUNNING TRAINS — DISOBEDIENCE OF RULE BY ENGINEER — COLLISION — CONTRIBUTORY NEGLIGENCE. — 1. Where the official printed schedule, furnished to conductors and locomotive engineers, prescribes a given hour and minute for leaving the starting terminus, and no provision is made in the rules and regulations for starting at any other time, to enter on the trip fifteen minutes after the prescribed time has expired, is to vary from the schedule; and if done without express authority from the superintendent, or the proper general officer of the road, it is a breach of orders.
2. For conductors and engineers to abide absolutely and invariably by the schedules furnished them for running trains, except when clearly and expressly authorized to vary therefrom, is of the last importance to both life and property; and where the printed rules which accompany the schedules warn both employees that they will be held responsible for the satisfactory running of the schedules, an engineer cannot excuse himself for commencing a trip fifteen minutes after his schedule time has expired, by the fact that he acted under orders from the conductor. The schedule being prescribed by their common superior, neither could absolve the other from his obligation to observe it.
3. When, according to regular schedule, one railroad train is to arrive at a given point thirteen minutes before the time fixed for another train to leave that point daily on a new trip, such point is a terminus as to the latter train, and not a meeting point as to either; especially, when real meeting points are plainly designated as such on the schedule, and the designation is omitted in respect to the point in question.
4. Under the law, which inhibits a recovery by an employee when not free from fault himself, the verdict is contrary to evidence (1).

(*Syllabus to official report.*)

1. On a subsequent appeal in the McDade case, it was held that the law of this case was settled in 59 Ga. 73 (the case at bar). It was held that "under the evidence, and the law applicable thereto as heretofore expounded by this court in the same case, the grant of a new trial, on even a third verdict for the plaintiff, followed legally and logically. It would have been an improper

APPEAL from judgment for plaintiff for \$1,250 in the De Kalb Superior Court. The facts appear in the opinion. *Judgment reversed.*

CHANDLER & THOMSON and HENRY HILLYER, for plaintiff in error.

JOHN T. GLENN and JOHN A. STEPHENS, for defendant in error.

**Bleckley, J.**—Two trains came in collision upon the Georgia Railroad. One of them was the down day-passenger train, bound from Atlanta to Augusta; the other was the Stone Mountain passenger train, bound from Stone Mountain to Atlanta. The place of collision was about two miles from the mountain, and two or two and a half miles from a switch, the first station above. The precise time of the collision is not fixed by the evidence, but it was not earlier than seven o'clock, forty-one minutes, in the forenoon, and must have been not many minutes later. The official schedule for the down train prescribed six o'clock, thirty minutes, for leaving Atlanta, six o'clock, fifty-nine minutes, for leaving the switch, and seven o'clock, twelve minutes, for arriving at Stone Mountain. The official schedule for the Mountain train prescribed seven o'clock, twenty-five minutes, for leaving the Mountain, seven o'clock, forty minutes, for reaching the switch, and eight o'clock, thirty minutes, for arriving at Atlanta. Thus, the time for this train to leave the Mountain was thirteen minutes after the time for the down-train to arrive there. The Stone Mountain train was an accommodation train, running each way, daily, between the Mountain and Atlanta. It carried no mail and had no connections to make. Returning to the Mountain in the afternoon it had to pass the up day-passenger train bound from Augusta to Atlanta, at Decatur. Decatur was accordingly indicated on the schedule as an afternoon meeting place. The schedule, as originally printed, designated the switch as the morning meeting place with the down day-passenger train, and so, at one time, had been the actual running of the trains. But that arrangement was discontinued, and a strip of paper on which the changed time-table appeared

exercise of discretion not to grant it. employees of the company, cannot re-In this State, the employee of a rail- cover." Judgment granting new trial road company who receives a physical affirmed. See McDADE v. GEORGIA R. injury, partly by his own fault, and R. Co., 60 Ga. 119 (1878). partly by the fault of other servants or

in print, was pasted over the original time-table, and over the letters designating the switch as a meeting point; so that, at the period of the collision, the switch was no longer a meeting point, nor was there, according to the schedule then in force, any meeting point whatever for the two colliding trains, unless Stone Mountain, the starting terminus of the accommodation train, was to be so regarded. The down day-passenger train of that morning was prevented from leaving Atlanta on schedule time by certain work upon the track within the city, which was in progress, and which had to be completed before the train could pass over. The delay was thirty minutes, and the train left at seven o'clock, instead of half-past six. In leaving the switch it was forty-two minutes behind schedule time; that is, it left at seven o'clock, forty-one minutes, which was just one minute after the Mountain train was due there. The Mountain train left Stone Mountain at seven o'clock, forty minutes, having waited fifteen minutes beyond its schedule time. When it left, the down train had been due at the Mountain twenty-eight minutes. The down-train having run two or two and a half miles from the switch, and the Mountain train about two miles from the mountain, they met and ran together. Just before the moment of collision, the engineman on the Mountain train, seeing the danger, and having reversed his engine and put on brakes, jumped from the engine to the ground, breaking his arm by the fall. For this injury the present action was brought by him against the railroad company. He recovered \$1,250, and the court below refused the company a new trial.

1, 2. In the plaintiff's declaration, he alleged that the train he was upon, to wit: the Mountain train, departed from Stone Mountain at the time and in the manner prescribed by the rules and regulations and directions of the defendant. There is no complaint that the schedule or the rules and regulations were ambiguous or imperfect, or that the plaintiff did not or could not understand them. On the contrary, he alleges, in effect, that he complied with them. Did he do this, is the main question in the case. The schedules and rules for his government were in a printed book, emanating from the superintendent of the railroad, and a copy of the book was in the plaintiff's possession. That book designated Decatur as a meeting place, but did not designate Stone Mountain as such. It fixed one time for leaving Stone Mountain, and contained no allusion to any

other time. The only time for the departure of plaintiff's train was seven o'clock, twenty minutes. He did not go then, but went fifteen minutes later. By this variation from the plain letter of the schedule, he threw himself upon a part of the track where he had no right to be at the time the collision occurred. If he had pursued the schedule he would have reached the switch before the down-train left it. He was due there at seven-forty, and the down-train waited till seven-forty-one. He started from the Mountain at precisely the time he was told by the schedule to arrive at the switch. According to his own testimony his opinion was that it was right to start on schedule time, but he was overruled by the conductor. But the schedule was obligatory upon both alike. He cannot plead the conductor's orders as a justification for violating the printed orders of their common superior. By a clause in the printed book which contained his instructions, he was warned that "conductors and engineers will be held strictly responsible for the faithful observance of all rules, and the satisfactory running of schedule." The observance of schedule was not a divided duty, but a joint duty. If the schedule was run at all, it had to be run by both, each performing his allotted share of the work. Whenever either attempted to vary from the schedule in a case not provided for by the rules, no running could be done without returning to the schedule and abiding by it. It was the chart of both. That they could not co-operate, might be a good excuse for not running at all, but could not be an excuse to either for running wrong. Where railroads have, as in this State, but a single track, and trains running in both directions, if they are to be used with the slightest approach to safety, there must be, on the part of the enginemen and conductors, absolute and invariable compliance with the schedules prescribed to them. Nothing is more important — nothing can be more important. In no other way can there be any degree of security to the lives of passengers or of innocent employees on the various trains, or to the engines and trains themselves as property. Any other mode of running means wreck and death.

3. Neither the plaintiff nor his conductor had any sufficient reason for treating the Mountain as a meeting point, within the language of the printed rules. They both knew there had been a meeting point at the switch and that it had been discontinued. They also knew that there was still a meeting point at Decatur

for the afternoon trains, and that it was plainly designated as such on the schedule. They should have understood that meeting points were those only that were so denominated, and at which trains, in the regular working of the schedule, actually met and passed each other. The Mountain was a starting point — as much so as Atlanta. From it the Mountain train started each morning on a new trip. Moreover, the time for starting was not until thirteen minutes after the other train arrived. These two trains were not to meet each other anywhere. There was no meeting place for them appointed. For them to meet each other would be wholly irregular; it would be to change the schedule, and not to run it as it was.

4. Undoubtedly the down-train was out of time. When it left Atlanta, unless it left under special orders, of which there is no evidence, it had no right to leave. We can see no justification for its proceedings, any more than for those of the Mountain train. But fault there does not relieve the plaintiff. Unless clear himself he cannot recover, whatever may be the blame attached to others. Under the evidence in the record he failed to do what his declaration alleges — he failed to run according to the rules and regulations prescribed. He had no warrant for leaving fifteen minutes after his schedule time. He did leave, nevertheless, and he must take the consequences. We direct a new trial on the ground that the verdict is contrary to evidence. It is unnecessary to deal with the charge of the court, further than to say that it should be made to conform to the views expressed in this opinion.

Judgment reversed.

## CENTRAL RAILROAD COMPANY v. MITCHELL.

*Supreme Court, Georgia, September Term, 1879.*

[Reported in 63 Ga. 173.]

**ENGINEER INJURED BY OBSTRUCTION ON TRACK — CAVE-IN OF EMBANKMENT — JUROR — DECLARATION — PERSONAL INJURIES — WITNESS — EXPERT — CHARGE — NOTICE — EVIDENCE — VIOLATION OF RULES — RAILROAD LIABLE.** — 1. An employee of a railroad company is not a competent juror to try a case in which the company is a party.

2. The declaration alleging that plaintiff "in his body was violently and grievously bruised; mangled and broken, to wit: in and upon his head,

arms, legs and body, and particularly as to the serious injury and wounding of his internal vital organs," such allegation is sufficient to permit testimony of injury to kidney, urinary organs, bloody urinal discharges, and the nervous system.

3. A scientific expert may testify in respect to the character of cuts and embankments, slopes, etc., though his information about them be derived much from books.
4. The natural bias of relations, or servants, or employees, is matter for legitimate comment by counsel before the jury, whether such witnesses be introduced by one side or the other.
5. Charges of the court excepted to by parties will be construed in connection with the entire charge, and if unobjectionable when so construed, will not authorize a new trial.
6. Though the evidence on the subject of notice be conflicting, yet the court may charge on the legal effect of it if the jury believe that it was given.
7. A railroad company is under obligation to employees to observe all ordinary and reasonable precaution to keep its road in such condition as to make their passage reasonably safe, and if it neglect such ordinary and reasonable precaution, and the road becomes unsafe, and employees are thereby injured, then the company is liable for damages done by such negligence, if the injured employee be without fault.
8. Before an employee can relieve himself of the legal consequences of violating any rule of the company whatever, no matter how disconnected it may appear to be with the disaster which damaged him, he must show that his violation of the rule did not contribute at all to that disaster. Upon clear proof that it did not contribute at all thereto, his recovery will not be defeated by such harmless violation of rule. Thus, where the engineer is the plaintiff, and he permitted a brother engineer of the company to ride upon the engine with him from Bolingbroke to Macon (the rule prohibiting him from permitting any person to ride thereon), and the disaster and damage was caused by the falling in of an embankment near Macon, and it was made to appear from the testimony of both engineers that everything possible was done to avert the catastrophe, and that the presence of the passenger engineer did not, in the slightest degree, contribute to the disaster, but that the same was caused solely by the falling in of the embankment, the recovery of the plaintiff will not be defeated by his suffering the other engineer to ride on the engine with him.
9. The charge of the court being entirely unexceptionable as a whole, and properly fair to both parties, and the evidence being sufficient to sustain the verdict, this court, in accordance with its oft-repeated ruling, will not control the presiding judge in the exercise of his discretion in overruling the motion for a new trial based on the ground that the verdict is against the weight of the evidence.

WARNER, Ch. J., *dissented* (1).

(Official syllabus to the report.)

1. In Savannah, Florida & Western unanimous court. The unanimous R'y Co. v. Barber, 71 Ga. 644, it is affirmance seems to have been made in stated that the Mitchell case (the case Central R. R. v. De Bray, 71 Ga. 406, at bar) had since been affirmed by an 14 Am. NEG. CAS. 96, *ante*.

APPEAL from judgment for plaintiff for \$6,000 in the Bibb Superior Court. *Judgment affirmed.*

Mitchell sued the Central Railroad for damages. It appeared that he was an engineer on defendant's road. That in a cut near the city of Macon a large bank of dirt slid from the side of the cut and covered the track; that plaintiff, with the train on which he ran, came upon this obstruction, and, being unable to stop in time, an accident occurred which very seriously injured him. The main question of fact in the case was, whether the cut was properly constructed and kept by defendant or not, and whether, therefore, the slide and the consequent accident was the result of negligence or of natural causes, over which defendant had no control. There was some conflicting evidence as to whether the roadmaster of defendant had notice that the embankment was likely to give trouble. A conductor testified to having called the attention of the roadmaster to the cut generally, though not to any particular point; he also stated that he did not apprehend any serious danger, and did not know certainly that the slide occurred at the point which had attracted his attention. The roadmaster denied any recollection of having had notice in regard thereto.

Another point of contest was as to the negligence or diligence of the plaintiff. Besides conflicting evidence on the subject of the speed at which he was running, etc., the following occurs in his own testimony: "It is against the rules of the company to have anybody on the engine except the fireman and the wood-passenger, unless one of them gets sick. It is against the rule to carry any one as a passenger on the engine. \* \* \* There was still another man on the engine that night. It was Mr. Emerson. He got on at Bolingbroke to come to Macon to go out on his engine. I had no authority for that; there was room in the cars for him, and there was room on the engine with me." There was no evidence indicating that this violation of the rules affected the accident or had any influence upon it. The jury found for plaintiff for \$6,000. Defendant moved for a new trial on the following among other grounds:

1. Because of error in sustaining challenge of plaintiff to one of the jurors who was an employee of defendant.
2. Because the court erred in permitting plaintiff to testify as to the injuries sustained in his kidneys, urinary organs, etc., there being nothing in plaintiff's declaration to allow or justify

such proof. [The declaration alleged that by reason of the accident plaintiff was "in his body violently and grievously bruised, mangled and broken, to wit: in and upon his head, arms, legs and body, and particularly as to the serious injury and wounding of his internal vital organs and as to the violent straining or breaking of the thigh-bone of his left leg, and the violent tearing asunder, breaking and dislocating the joints of the bones of the knee of his left leg, and the violent tearing, mangling and breaking of the tendons, ligaments, sinews and muscles binding the same," etc.]

3. Because the court allowed the testimony of a witness, a civil engineer, and all others on that point, as to what the books stated as to what was the most valuable class of earth for embankments, etc., and what the authorities give as to the rule for construction of walls or cuts, etc., on the ground that it was not original, but hearsay evidence.

4. Because of error in allowing plaintiff's counsel, over objection by defendant's counsel, to comment on the evidence of one of the witnesses, which defendant contended was an attempt to impeach the evidence of such witness.

5. Because the court erred in charging the jury at the request of plaintiff's counsel, "that the railroad company is under obligations to its employees upon the trains to observe all ordinary and reasonable precaution to keep its road in such a condition as to make the passage of such employees reasonably safe, and if the company by neglecting such ordinary and reasonable precautions, allows its road to be unsafe, and its employees are injured by such negligence, then the railroad is liable for the damage thus done if the employee injured was not himself at fault."

Motion for new trial overruled and defendant excepted.

A. R. LAWTON and LYON & GRESHAM, for plaintiff in error.

BACON & RUTHERFORD and C. J. HARRIS, for defendant in error.

**Jackson, J.**—The defendant in error sued the plaintiff in error for very serious and life-long injuries to his person—so serious as wholly to unfit him for his regular business, and to disable him for all active work. The jury found \$6,000 for the damage done him, and the defendant, the plaintiff in error here, being denied a new trial excepted. The defendant in error was an engineer on the road, and ran the train on the occasion of the

calamity, and the case involves the important question of what character of fault on his part will prevent a verdict for him, and this is the main question in the case, upon which the chief justice differs and dissents from a majority of the court. Before considering it, however, it will be necessary briefly to notice the grounds of exception to the rulings of the court.

1. We think that the employee of the company was properly rejected as a juror. To sit on the case he must be "*omni exceptione major.*" The servant of the company is not. It is almost impossible, however incorruptible one may be, not to bend before the weight of interest; and the power of employer over employee is that to him who clothes and feeds over him who is fed and clothed. Hence the common law excluded all servants, and our statutes have nowhere altered the rule, and it should not be altered. A close relative is a less dangerous juror, if not a dependent kinsman, than one who is dependent on his employer. See 3 Chit. Blackst., p. 363; Bacon's Abridg., Juries, 2, 347, 5, 353; Tidd's Prac., 852, 3.

2. The declaration is drawn with much fullness and is ample to cover the proof introduced in respect to the injuries received by Mitchell.

3. The expert was competent to testify. Every expert derives much of his knowledge from books as well as from experience, and can give his opinion based upon the knowledge acquired from both services.

4. If an employee be incompetent as a juror, an employee's interest or natural bias is matter for legitimate comment before the jury in argument by counsel. Even though introduced by the party thus commenting, it is legitimate to call attention to the bias in order to give more force to what the employee may swear against his master, just as a brother swearing against a party in that relation to him might well be considered as entitled to great credit, and when for him, to less. Not that either could be impeached by the party calling him, but the fact of relationship or obligation or service may be properly evoked by counsel with a view to strengthen or weaken the force of what is testified — the natural heightening or softening the colors of the story without impeaching the integrity of the witness.

5. The charge of the court will always be read as one whole view of the law, when set out in full in the record; and exceptions to parts of it must be considered in the light of all other parts.

So construing this charge, it is unexceptionable in the opinion of the entire bench, except in the one particular wherein the chief justice dissents, and which will be hereafter considered.

6. It is for the jury to say whether or not the company had notice of the improper structure or condition of the embankment, and if there be any evidence of such notice, the court not only has the right, but it is his duty, to charge on the legal effect of the notice, if the jury believe from the testimony, though conflicting, that it was given.

7. Common sense, as well as all law on the subject, and our own Code, make it the duty of the railroad companies to observe all ordinary and reasonable precautions to keep the road in such condition that its employees engaged in running the trains may safely discharge their duty to the company; and if, by the neglect of the company, or other employees, the road becomes unsafe, the employee who is injured by such neglect, unmixed with fault in himself, may recover. Such is plainly the meaning of our own statute. Code, §§ 2083, 2202, 3036. It would be exceedingly hard upon one whose duty it is to run the engine to deny him redress when he was faultless in his work, for causalties or injuries to him caused by the builder of the road, or the track-raiser, or other employee wholly disconnected from him and his work.

8, 9. But he must himself be without fault in the matter that brought about the calamity. And hence arises the only point on which the court is divided, and that is, whether the employee must be absolutely faultless in the discharge of his duties wholly disconnected with the catastrophe, or faultless in respect to something which contributed to produce the catastrophe. We think that our own statute settles it, and our own decisions accord with the construction we give the statute.

Section 3036 of the Code reads: "If the person injured is himself an employee of the company, and the damage was caused by another employee, and without fault or negligence on the part of the person injured, his employment by the company shall be no bar to the recovery." This means, clearly, if the damage was caused by another employee, and was not caused by the fault or negligence of the employee hurt, then he may recover. If he immediately or remotely, directly or indirectly caused it, or any part of it, or contributed to it at all, then he cannot recover; but though he had been at fault about something wholly disconnected

with the transaction, or was at the time at fault about a matter that had nothing to do with the catastrophe, then he may recover. And such is the law in all the books and all the cases bearing on the point. And it must be so. Suppose the man whose duty it is to light the lamps failed to do so and was at fault, and owing to a defective embankment the cars were wrecked, and he injured, could he not recover when his failure to light the lamps had nothing upon earth to do with the catastrophe, and did not cause it or contribute a mite to it?

So in this case, the embankment caved in, filled up the road, and caused the wreck of the cars and the damage to the engineer; and it is seriously contended that he should not recover because he had a brother engineer of the same company on the engine with him, against a rule which allows no one but the engineer and fireman to ride thereon. It is doubtful whether the rule was meant to exclude another engineer of the same company. The reason and spirit of it would seem against such a construction. The engineer was taken up at Bolingbroke, a few miles from Macon. Both of them, and the fireman, all swear that his presence did not contribute, and could not have contributed, to the calamity; that the engineer did his whole duty, all he could to prevent it; and yet because he permitted the other engineer to sit on the engine, it is argued that he should not recover. We cannot so see the plain letter of § 3036 of our Code, nor the reason and spirit of our law.

In *Kenney v. Central R. R.*, 61 Ga. 590, this court say in the syllabus, Judge Bleckley writing it and all agreeing to it: "*Any substantial fault of an employee, however slight, which contributed to the injury for which he sues, will defeat his action.*" So, in *Atlanta & West Point R. R. Co. v. Webb*, 61 Ga. 586, the syllabus again prepared by the same judge and approved by the entire court, occur these words: "*If his own negligence contributed substantially to the injury, there can be no recovery, the doctrine of apportionment of damages on account of contributory negligence not applying in such a case, but the principle of § 3036 of the Code being applicable, which section demands that the employee shall be free from fault or negligence.*" Here, as in the preceding case, not only must the fault or negligence *contribute* to the damage, but it must contribute *substantially* thereto. Such, too, is the spirit of the reasoning in *Central R. R. v. Sears*, 61 Ga. 279; *McDade v. Georgia R. R.*, 60 Ga. 119 and 59 Ga.

73; Central R. R. v. Sears, 59 Ga. 436; Central R. R. v. Kenney, 58 Ga. 485; Marsh v. So. Car. R. R. Co., 56 Ga. 274; Georgia R. R. v. Goodwin, 56 Ga. 196; Western & Atl. R. R. Co. v. Adams, 55 Ga. 279; Thompson v. Central R. R., 54 Ga. 509; Campbell v. A. & R. A. L. R. Co., 53 Ga. 488; A. & R. A. L. R. Co. v. Ayers, 53 Ga. 12; Sears v. Central R. R., 53 Ga. 630; Georgia R. R. v. Oaks, 52 Ga. 410; East Tenn., Va. & Ga. R. R. Co. v. Duggan, 51 Ga. 212; Rowland v. Cannon, 35 Ga. 105, 14 Am. Neg. Cas. 120, *ante*. Attention is particularly called to the last case, which is the leading case, and where Lumpkin, Ch. J., construes the Code precisely as I do here, and most emphatically rules that the fault or negligence of the employee suing must *contribute* to the injury in order to bar his recovery (1).

The issue in this case was, whether the company, through its other agents, servants and employees, was negligent in not having a proper embankment at the point where it fell in, and which caused the wreck, or whether it fell in from natural and unforeseen consequences. The defendant in error had nothing to do with the erection or repair of the embankment, nor did he know of its condition. He ran by it at night, and only at night, for months before the casualty. The falling in of the embankment solely caused the wreck; whether it fell from natural causes, free from fault by the company, or from the defective manner of its construction originally, or the defective manner of its repair, was the sole issue. Mitchell had no part or lot in it, and was as blameless about it as a child unborn.

It was for the jury to say what caused it to fall — negligence of the company, or natural causes without their fault. On this point the testimony is conflicting, the jury settled it, and the presiding judge approves the verdict.

The charge is lucid, able, impartial, and without fault so far as we can see, and the judgment overruling the motion for a new trial must be affirmed.

See further 20 Iowa, 562; 33 Iowa, 411; 24 Ind. 52; 47 Mass. 416; 6 Ohio St. 109; Saunders on Negl., 56 et seq.; Shearm. & Redf. on Negl. 32; Whart. on Negl., book II, 29, also chap. IX; 19 Conn. 566; 4 Am. Rep. 274; 6 Am. Rep. 191.

Judgment affirmed.

1. See the cases cited in the case at bar, reported with the Georgia cases in this volume of AM. NEG. CAS.

WARNER, CH. J., *dissenting*. — To entitle an employee of a railroad company to recover damages against the company for an injury sustained by him when in the service of the company, it must be shown that he was without fault or negligence on his part, at the time of the injury. Code, § 3036. It appears from the evidence of the plaintiff himself in this case "that he was the defendant's engineer, running its train of passenger cars at the time of the injury complained of, that it was against the rules of the company to have anybody on the engine except the fireman and the wood-passenger; that he took a man on the engine with him at Bolingbroke, by the name of Emerson, to go to Macon, and that he had no authority for that." The court charged the jury, amongst other things: "You may also inquire whether the plaintiff allowed unauthorized persons to ride on the engine with him. If you so find, then inquire further and ascertain whether those persons contributed to or caused the injury. If they did, you would be authorized to find for the defendant. If they did not, then you would not be authorized to find for the defendant on that ground. The fault or negligence of the plaintiff must contribute to, or cause the injury." That the plaintiff was at fault when he took Emerson on the engine, and who was on it at the time of the injury, in violation of the rules of the company, cannot be disputed. The rule of the company which forbade its engineer to have anybody on its engine, except the fireman and wood-passenger, was doubtless intended for the better security of its own property as well as the safety of its passengers being transported on its road, by removing all inducement and temptation from its engineer to withdraw his entire attention from his strict duty when running its engine and cars upon its railroad. If other persons were allowed to be on the engine with the engineer when running its train, talking with him, or otherwise diverting his attention from the strict line of his duty in watching the track before him, to see if there were any obstructions on it, it would not only have a tendency, but would be well calculated to contribute to the loss and injury of the company, and the injury of passengers also, and hence the adoption of the rule by the company it may fairly be presumed. At any rate, it was a rule of the company, and a violation of it by its engineer was no minor fault, but one which, it will be readily perceived, might contribute to the serious injury of the company, as well as passengers on its train. Suppose a passenger

on defendant's train had been injured, and had sued the company for damages, and had proved that at the time of the injury, defendant's engineer and agent had an unauthorized person on its engine, in violation of its own rules, what reply could the defendant have made to the charge of negligence in running its train? The true law of the case is not that the fault of the employee of the company in violating its rule must contribute to the injury, but that if the fault of the employee in violating the rules of the company *might* have contributed to the injury, then he cannot recover, for the reason that he was not without fault on his part. The charge of the court was that the fault or negligence of the plaintiff *must* contribute to or cause the injury, whereas it is quite apparent that the fault of the plaintiff in violating the rules of the company, as its trusted engineer, might have contributed to the injury, not only of himself, but to the injury of the company whose employee he was, as well as to the injury of the passengers on its train. The plaintiff's undisputed fault, as the company's employee, which might have contributed to produce such disastrous results, will not allow him to recover, under the statute, against the company, and as such employee, notwithstanding there is no evidence in the record that his fault in violating the rules of the company did contribute to his injury; but he was nevertheless acting in open violation of the rules of the company when he was injured, and thereby exposing the company and its passengers to injury in consequence thereof, that was his admitted fault, and, therefore, he is not entitled to recover.

NEGLIGENT RUNNING OF TRAIN — ENGINEER AND FLAGMAN RUN OVER — PLEADING — AMENDMENT — PLEA IN ABATEMENT — WITNESS — EVIDENCE — MODEL OR DRAWING — CONDUCTOR — EVIDENCE AS TO DUTIES OF ENGINEER — EXPERT — HEARSAY EVIDENCE — ERRONEOUS EXCLUSION OF EVIDENCE — VERDICT. — In AUGUSTA & SUMMERTON R. R. CO. v. DORSEY, 68 Ga. 228 (1881), where plaintiff (a flagman and engineer) alleged negligent running of defendant's engine and cars whereby he was run over and his left leg so mangled that it had to be amputated, judgment for plaintiff for \$11,000 in the Richmond Superior Court was *reversed*, the rulings in the Supreme Court being stated in the official syllabus to the report as follows:

" 1. A suit against a railroad company for damages resulting from the careless and negligent running of its engine may be amended by setting out negligence in not discovering and remedying defects in the machinery of the engine, which by the use of ordinary care and diligence could have been discovered and remedied so as to prevent the accident. Such amendment does not add a new cause of action.

" 2. That since the commencement of the pending suit the same plaintiff has brought suit for the same cause of action against another defendant, is not good ground for a plea in abatement nor for compelling the plaintiff to elect which action he will pursue.

" 3. The plaintiff being an expert engineer, and one question being whether he had been negligent at the time of the accident which was the basis of the suit, it was competent to prove by him what were his duties.

" 4. He could also testify to the fact that he had complied with all the instructions given him.

" 5, 6. A model or drawing may be made by a party to a suit to illustrate any article of machinery involved in the issue on trial, without notice to the opposite party. Whether such model or drawing is properly proved to be such, is another question, and one not made here.

" 7. One question in a case being whether an engineer could be stopped under certain circumstances, an expert who testified on that subject could give his reasons for what he stated, and for that purpose, by way of illustration, state what he had known to be done under even more difficult circumstances.

" 8. The question being as to the duties and diligence of a particular employee, testimony that employees are generally required to work with dispatch is not admissible.

" 9. A conductor in authority over an engineer may testify as to the duties of the latter.

" 10. If specific instructions are given to an employee, they will control him; but if none are given, he will be governed by the general duties of his position. Where the testimony as to the existence of specific instructions was conflicting, the general duties of the position could be proved, as bearing on the case in the event the jury believed no specific instructions existed.

" 11. Where the opinion of an expert is admissible without giving any reason, the opinion of one not an expert is admissible with his reasons therefor.

" (a.) The existence of negligence being a vital issue in a case, the exclusion of competent testimony in respect thereto is a substantial error, and not a mere technical one.

" 12. In a suit by an employee of a railroad against his master for damages alleged to have resulted from the negligence of a co-employee, the latter is competent to prove that he was not at fault, under proper questions for that purpose.

" 13. Facts cannot be proved by a witness who states them from hearsay.

" 14. After amending his action, it is immaterial to prove why the plaintiff did not originally set out his cause of action in the shape put upon it by the amendment.

" (a.) If this could be done, his statements to his counsel are not admissible for that purpose, he being himself a competent witness.

" 15. After all the testimony has been closed, to reopen it for further direct testimony is a matter resting in the sound discretion of the court, and unless abused, it will not be controlled.

" 16. The requests to charge in this case were substantially covered by the charge as given.

" 17. In a case involving vindictive damages this court would set aside a verdict if it had reason to suspect that such verdict was the result of bias in favor of one class of suitors or prejudice against another class.

" 18. Persuasive oratory is among the legitimate weapons of the lawyer, and that juries are affected by it is no ground for granting a new trial."

**ENGINEER KILLED IN COLLISION — CRIMINAL NEGLIGENCE.** — In **CENTRAL RAILROAD v. ROACH**, 70 Ga. 434 (*August, 1883*), locomotive engineer killed in collision, judgment on verdict for plaintiff for \$5,000 in the Chatham Superior Court was affirmed (1).

A. R. LAWTON, appeared for plaintiff in error; R. E. LESTER, for defendant in error. The official syllabus (per HALL, J., and JACKSON, CH. J.) states the points decided as follows:

1. There was no error in overruling the motion to dismiss this case.  
(a.) The cases of *Daly v. Stoddard*, 66 Ga. 145, and *McDonald v. Eagle & Phenix Mfg. Co.*, 67 Ga. 761, were decided after this case was before the court on a former occasion (66 Ga. 365); no question as to the necessity of criminal negligence in a co-employee was then made, and the doctrine of *res adjudicata* does not apply (2).

1. In **CENTRAL R. R. & BANKING CO. v. ROACH**, 64 Ga. 635 (1880), homicide of plaintiff's husband, an engineer in defendant's employ, caused by jumping from engine to avoid collision, judgment for plaintiff in the Chatham Superior Court for \$5,000 was reversed. 2. On this point JACKSON, CH. J., said: "It is enough to say that the

(b.) This court has held, by a full bench, that to entitle the widow of a servant to recover against the principal for the homicide of her husband resulting from the negligence of a fellow-servant, it must appear that the homicide amounted to a crime in such neglectful servant, either murder or manslaughter of some grade (1). The law in respect to the liability of railroad companies and druggists rests on other grounds. 67 Ga. 763; Code, §§ 3005, 2083, 3036, 2202. [HALL, J., did not concur in the principle stated in the foregoing paragraph.]

(c.) An adjudication by a full bench cannot be modified or reversed where only two members of the court preside. Where a principle has been settled by an unanimous judgment of a full court, and afterwards the reverse of it is laid down by a like unanimous judgment of a full bench, without any application for review or reference to the first judgment, no opinion is intimated as to which would bind the court.

2. Taken alone, the charge complained of might have been imperfect for want of fullness, but in connection with its context, the charge was full and in accordance with the former rulings of this court.

3. A verdict for damages will not be set aside for excessiveness unless the amount found be so excessive as to authorize a suspicion that it was the result of bias or prejudice, or to justify the inference of gross mistake. (JACKSON, CH. J., concurred specially.)

## THE CENTRAL RAILROAD v. CROSBY.

*Supreme Court, Georgia, February Term, 1885.*

[Reported in 74 Ga. 737.]

ENGINEER KILLED IN COLLISION — MEASURE OF DAMAGES — MORTALITY TABLES — REMITTITUR — PLEADING — JUSTIFICATION — CHARGE — EMERGENCY — LEAPING FROM TRAIN.—

1. Where, in a suit by a wife for the homicide of her husband, who was a ruling in *Daly v. Stoddard*, 66 Ga. 145, and *McDonald v. Eagle & Phenix Mfg. Co.*, 68 Ga. 839 [see also 67 Ga. 761] is inapplicable to the railroad companies, as was distinctly announced in the opinion in the latter case." The point made by defendant was that there could be no recovery unless defendant, through its agents, was guilty of homicide, either wilfully, as in cases of murder and voluntary manslaughter, or unintentionally, as in cases of involuntary manslaughter by criminal negligence. The opinion in the McDonald case, *supra*, expressly excepts druggists and railroad companies from the rule. See 14 Am. Neg. Cas. 12, *ante*.

1. On this point the court cited Western & Atlantic R. R. Co. v. Strong, 52 Ga. 466.

railroad employee, the Carlisle tables of mortality were introduced in evidence and the value of the services of the deceased proved, thereby furnishing a measure of damages, and after a verdict for the plaintiff for \$12,000, and pending the motion for new trial, counsel for plaintiff voluntarily wrote off from the verdict \$2,000, so as to come within the measure of damages proved, the refusal of a new trial was not error.

- (a.) This case differs from that of the *Savannah, Florida and Western R. R. v. Harper*, 70 Ga. 119 (1).
- (b.) Counsel for the plaintiff could write off any part of the damages recovered, and the defendant could not complain, because it was not hurt by making the judgment less.

JACKSON, CH. J., dissenting.

- 2. In a suit against a railroad on account of the homicide of an employee, an allegation that the company did the negligent or careless act which caused the homicide, or omitted the diligence which would have prevented it is sufficient, and is equivalent to an allegation that the co-employees of the decedent were guilty of such negligence.
- 3. In a suit by the widow of a deceased employee of a railroad for his homicide by the negligence of his co-employees, a plea which admitted the killing but did not admit either that decedent was free from fault or that the other employees were at fault, was not a plea of justification.
- (a.) Where all the evidence, admissible under a plea claimed to be a plea of justification, would be admissible under a plea of the general issue, such a plea would not amount to a plea of justification, or give the defendant the right to open and conclude.
- 4. The Carlisle tables of mortality are admissible in evidence. They are not conclusive, but may be considered by the jury as data on which they may act.
- 5. When read in connection with the entire charge, there was no error in charging, on the issue as to the engineer's remaining on the engine, or jumping off to save his life, when a collision was imminent, that if, in the emergency upon him, he believed, and had reason to believe, that by sanding the track or otherwise working the engine, he could prevent a collision and save life, and it was necessary to that end that he remain at his post in this moment of danger, then for his death, resulting from such collision, his widow could recover; but if it was not so necessary, and he knew it, then she could not recover on this issue.
- 6. The refusal to charge the requests contained in the fifth, sixth and seventh grounds of the motion for a new trial will not authorize a new trial, when considered with the charge of the court. The charge was full, fair, clear and able.

1. The case of *SAVANNAH, FLORIDA & WESTERN R. R. v. HARPER*, 70 Ga. 119 (1883) was an action by Harper and wife for injuries to the latter caused by negligent running of defendants' train, where after verdict for \$6,000, the judge ordered a new trial unless plaintiffs would write off from said verdict, \$2,000, leaving it to stand as if originally given for \$4,000, which plaintiffs ac-

cordingly did, and new trial was refused. On appeal by defendant the Supreme Court held that the action of the trial court was error, and reversed the judgment and ordered new trial. MR. JUSTICE HALL reviewed the authorities on the right of the trial judge to order remittitur or to set aside verdict where damages were either too small or excessive.

7. The evidence as to the negligence of the deceased was close, but was sufficient to uphold the verdict.

JACKSON, CH. J., *dubitante.*

8. In respect to avoiding an injury from the collision of a freight with a passenger train, by leaping from his engine, the engineer on the freight train should remain at his post so long as his presence on the engine may be of use to prevent the catastrophe.

(Official syllabus to report.)

Appeal from judgment for plaintiff in the Bibb Superior Court.  
*Judgment affirmed.*

Mrs. C. E. Crosby brought her action for damages against the Central Railroad, to recover on account of the death of her husband, caused by a collision of trains on that road. She laid damages at \$50,000. The defendant pleaded the general issue, and also filed special pleas, admitting that Crosby was killed by the collision of its train, but alleging that he was the engineer on one of them, giving a detailed history of the running of the trains from Savannah to the point of collision, and alleging that the train, which was running in front of that on which Crosby was, became divided by the breaking of a pin; that he was in violation of his duties in running at an improperly high rate of speed, and in not having his train under proper control; that he did not use proper means of stopping it; and that it ran into the one in front of it through his own carelessness; also that he remained on the train when it was apparent that a collision was unavoidable, and thus voluntarily exposed himself to the danger resulting therefrom.

On the trial, the following facts, in brief, appeared: Three trains left Savannah for Macon on November 27, 1880. These were respectively known as follows: Number 7, a freight train, was composed of two sections, A and B, both of which left Savannah at four o'clock P. M., and were due in Macon at five o'clock A. M., on the following day. Number 9 also was composed of two sections, A and B, carrying freight. They left Savannah at 5:40 P. M., and were due in Macon at eight o'clock A. M., the next day. Number 3 was composed in part of freight cars and in part of passenger and sleeping cars. It left Savannah at 7:30 P. M., and was due in Macon at eight o'clock A. M., the next day. Crosby was the engineer of section A of number 9. At station 12, Crosby's train caught up with number 7, and learned that section A of the latter, by reason of a disabled engine, or some other reason, could not make schedule time.

The engineer on section B of number 7 testified that section A of that train was run by an old gentleman who could not "pull his train;" that the witness ran close behind him so as to aid him, as was the custom with engineers where a train was "weak." Crosby followed both sections of number 7 until he reached station number 16, which he did as number 7 was leaving. By this time, however, the trains had fallen behind, so as to be on the schedule of number 3, and therefore sections A and B of number 9 took the side track and waited until number 3 should go by, which it did, and Crosby's train then followed, and was in turn followed by section B. Train number 3 reached station number 17 as train number 7 was leaving, and followed shortly afterwards, on its own schedule. Sections A and B of number 9 followed some ten or twelve minutes afterwards, on the schedule of number 3, being flagged by the latter. After leaving station number 17, there is a long up-grade, and after reaching its top, there is a long down-grade in which there are curves and cuts. In climbing this grade, train number 3 came up with section B of number 7, and as number 3 began to go down the grade, the engineer shut off steam and allowed the train to roll down. When the time came for him to increase his speed, he opened the throttle, and when he did so, he felt a jerk behind, and looking back, found that the rear portion of the train, where the passenger cars were, had become detached from the front portion. The separation of the hose or pipes connecting the engine with the passenger cars caused the air brakes to be applied, and the latter stopped, while the front portion of the train moved forward. On making the discovery, the engineer stopped his engine within about six car-lengths, as he testified, or a little more, as others testified, told his wood-passenger to gather up the hose which had pulled loose and was on the track, and started back to re-couple the separated portions of the train. A train-hand was also assisting in gathering up the hose. He discovered that the coupling-pin was broken, and called to another hand to bring another pin, but the person called appeared not to have heeded the call, being occupied in warning the passengers of the approaching danger. When the engine nearly reached the detached cars, the engineer testified that he heard the whistle of Crosby's train below, and discovering that there was no chance to make the coupling before the latter reached the spot, he at once moved forward to get out of the way. He thought that, if they had had what was needed

to make the coupling, it might have been done in time. When the rear portion of number 3 was found to be stopping, and it was discovered that it had become severed from the front portion of the train, the conductor told the baggage-master to go forward and make the coupling as quickly as possible, while he himself went back. When he had gone back about two hundred yards, he saw Crosby's train coming, and signalled for it to stop. The signal could have been seen about five or six hundred yards away. The conductor, who gave the signal, testified that, when signalled, Crosby's engine was 1,600 feet from the detached part of number 3. Crosby's train went on with very little, if any, diminution of speed, and ran into the rear end of the passenger coaches of number 3, and directly afterwards section B ran into the rear portion of section A. The fireman on Crosby's engine leaped from it, when he saw the approaching danger, and escaped injury. When Crosby reached a point where he could see the signal to stop, the evidence for the plaintiff shows that he blew on the brakes, reversed or tried to reverse his engine, applied steam, and began working the sand lever so as to sand the track. The evidence for the defendant tended to show that the engine was not reversed when found after the collision. There was some evidence to show that at times the lever would be jerked from the reversed position into a forward position. As to the necessity or propriety of Crosby's conduct, there was some conflict in the evidence. The plaintiff introduced evidence to show that working the sand-lever, and thereby sanding the track, in conjunction with reversing the engine and applying steam, would tend to stop the train sooner than it otherwise would stop; that sometimes the sand would be clogged, unless the lever was worked; also that the track was slippery that morning. The defendant introduces testimony to the effect that, if Crosby had blown on brakes, reversed his engine and opened the sand valve, he had done all that could be done, and might have left the engine. The fireman testified that Crosby said "look out;" that he jumped from the engine, and that, before he jumped, he inquired of Crosby if the latter was not also going to do so. There was testimony to the effect that a heavy freight train, in running on an up-grade, could only run slowly, and would necessarily run rapidly down grade, in order to make an average of time, in accordance with the schedule. It appeared that Crosby put on all the steam he could in coming up the grade, and had

it on when the train turned on the down-grade. The speed of his train in coming up the grade was estimated to be about eight miles an hour, and in coming down about eighteen or twenty miles, and there was some testimony to show that the train could not have been stopped within the distance from where he was at the time he was signaled to the broken section of number 3. The conductor on Crosby's train requested the conductor of number 3 to hurry away from station number 17 as quickly as he could. The latter flagged him, and he testified that that put everybody on notice that Crosby's train was following on the schedule of number 3 and had the same rights as had that train. Both trains were some minutes behind time when the collision occurred. Some testimony was introduced by the defendant to show that there was a rule that trains running on the same schedule should run a mile apart, but there was also testimony to the effect that this was not observed, and the trains in advance of Crosby were not keeping that distance. The defendant also introduced some evidence to show that an engineer would not be considered an ordinary risk for life insurance, but that a higher rate of premium would be charged on his life than on that of a person engaged in an ordinary occupation.

The plaintiff testified that her husband was not quite thirty-seven years of age, and was receiving \$105 per month, out of which he supported himself and family. The Carlisle table of life expectancy was introduced.

The jury found for the plaintiff \$12,000. The defendant moved for a new trial on the following, among other, grounds:

1. Because the court erred in refusing to allow the defendant to open the case or to open and conclude the argument.

2. Because the court erred in allowing the Carlisle table to be read and used before the jury, on the trial, as evidence,—the defendant insisting, by way of objection, that these calculations were made up upon the basis of the average of the lives of a great number of persons in the ordinary and usual avocations of life, while Crosby, the deceased, for the loss of whose life this suit was brought, was engaged in working as an engineer and lost his life in that business — a most hazardous occupation.

3. Because the court, after charging the jury to "look to all the evidence that led up to the accident, then look to see whether he" (Crosby) "could have avoided it by the exercise of ordinary care; look to how the train was running; look to what he had

done, and whether it was necessary for him to continue to do anything on that train. If you find that it was not necessary, find that the simple sanding of the track would not have prevented the collision, and he knew it, or ought to have known it," — erred in adding: " You can say whether he ought to have jumped off or not." The court also erred in further adding: " Or if you find that it was necessary for him to stay there to sand the track for the protection of his life, or the lives of the passengers and property, then you would find against that position and find in favor of Mrs. Crosby."

4. Because the court erred in failing to give the following charge to the jury, as requested in writing by defendant's counsel: " If you believe from the evidence that the plaintiff's husband could, by the exercise of ordinary care, have avoided the danger of a collision of the engine controlled by him with the cars on the track ahead of him, and he did not, then the plaintiff is not entitled to recover. To illustrate: if, after he saw, as an engineer, on approaching the obstruction on the track, that a collision was inevitable that might result in his death, and he could, after that, have avoided that danger by quitting his engine, then he was bound to do so; if he did not, then the plaintiff is not entitled to recover. To determine this question, you are authorized (to look) to the evidence of experts, such as other engineers, as to what is customary and proper to do in such exigencies."

5. Because the court failed to give the following request made by defendant's counsel: " If you believe from the evidence that, though the defendant may have been negligent in having the train standing on the road, or in failing to give notice promptly to the approaching train; yet, if you believe that Crosby could have saved himself from the effects of this negligence by the use of ordinary care on his part, or by any act which a careful engineer would have resorted to, then the plaintiff cannot recover. In considering the question of Crosby's exercise or want of ordinary care in saving himself from the consequences of the acts of defendant's agents, you should have reference to the opinions of experts of experience, of what he ought or ought not to have done at the moment, before the collision, to save his life."

6. Because the court erred in refusing to give to the jury the following written request of defendant: " If you believe that, in the exercise of ordinary care and with safety to himself, he,

Crosby, could have avoided his death by quitting his train, then you may consider that as a circumstance to show a want of ordinary care and diligence."

7. Because the court erred in refusing to give to the jury the following written request of defendant to charge: "That the acts of negligence complained of and set out in the declaration are the only acts that can be considered by the jury to charge the defendant, and if you are not satisfied that the plaintiff's husband was killed by the collision of his train with the cars on the track, but are in doubt whether he was killed by the second collision produced by the rear freight train, then you cannot find for the plaintiff in this case. She can recover alone on the negligent acts put out in the declaration."

8. Because the verdict of the jury is contrary to law and evidence and was excessive.

Pending the argument of the motion, counsel for the plaintiff voluntarily wrote off \$2,000 from the verdict. The court overruled the motion and defendant excepted.

A. R. LAWTON, LYON & GRESHAM, for plaintiff in error.

BACON & RUTHERFORD, for defendant.

**Jackson, Ch. J.** — The defendant in error sued the plaintiff in error for the homicide of her husband, who was an engineer on its road, running one of its trains, when the incident occurred. It seems that, in consequence of a feeble engine on one of the freight trains running on the same schedule that the train of which Crosby, the defendant in error's husband, was the engineer, was also running, all the freight trains got out of their regular order, and got on the same schedule on which a passenger train was running; that an accident happened to this passenger train, causing it to lose or break a coupling-pin, and thus delaying it between Gordon and Griswoldville, and that Crosby's train ran into it while thus delayed, and he was killed.

The jury returned a verdict for twelve thousand dollars; a motion was made for a new trial; the counsel of plaintiff in error wrote off two thousand dollars, on their own hook; the court refused to grant a new trial, based on this ground and many others, and that refusal on all the grounds is assigned for error here.

1. My own opinion is very decided that no party or counsel has the right, without leave of the court, to alter, in any particular whatever, the verdict returned by a jury pending a motion

for a new trial, or when such motion is in contemplation; and that when the refusal of the court to grant a new trial is based in a large degree on that alteration, a new trial should be granted by this court, and the judgment should be reversed on that ground, especially where the case on the facts is very close and the verdict quite large. The other members of the court differ from me on the point, however, holding that such a right exists in a case like this, where a fixed criterion is given for estimating damages, in their judgment, and where, by the reduction of the verdict, the plaintiff in error is not hurt, as they think the evidence shows, and where the judge ratifies what the counsel did by refusing a new trial on that ground.

My own opinion is that, where the presiding judge shows, in the reasons which he gives for refusing a new trial, that he was influenced by this act of counsel, the plaintiff in error was hurt. The probabilities are that the new trial would have been granted by the presiding judge if the reduction had not been made by the counsel; for he hesitated and doubted much about the case, and that hesitation settled into a determination to refuse the new trial, when he considered this unauthorized reduction, as his opinion in the record clearly shows to my own mind. Therefore I think that the plaintiff in error thereby lost his case; for if a new trial had been granted below, it would have been affirmed here. Moreover, I think that even the court below has no power to order the reduction of damages in a case like this, or to make the grant of a new trial depend upon such reduction being made; because damages are for the jury to assess, and there are no settled and fixed rules for estimating damages in a tort like this.

The uncertainty of life — the mere expectancy of its duration — the approach of age — the decline of strength — the hazard of so hard a life, so much exposed and worn — the uncertainty of employment — all these and many more considerations move a jury in estimating damages according to law, and no human being can tell what aliquot part is not supported by evidence and ought to be written off.

My brethren, however, differ from me in their views, and when I write the opinion affirming this judgment I am but their organ. They hold that this case, on the matter of a fixed criterion for damages, is unlike Savannah, Florida & Western

R'y v. Harper, 70 Ga. 119 (1); that in that case there was no fixed criterion for estimating damages; whereas, in this case there is, inasmuch as the Carlisle table of the expectancy of life fixes a recognized criterion for measuring damages when used in connection with the annual proceeds of the husband's labor; and therefore they hold that this case is not controlled by that; and that, as damages could be measured by this criterion, and as, in their judgment, the counsel had the right to write off any part of the damage and plaintiff in error could not complain, because not hurt by making the verdict against it less, they hold the plaintiff in error not entitled to a new trial on this ground.

2. We all agree that the defendant in error need not allege in the declaration that the homicide was caused by the acts of co-employees. When caused by employees of the company, it is caused by the company. The company, as a corporation, can cause nothing except through and by agents, who are all employees, and the allegation that the company, a corporation, did the negligent or careless act which caused, or omitted the diligence which would have prevented, the homicide, is an allegation that its employees were negligent and careless, and lacking in diligence.

3. So the court is unanimous in the opinion that the presiding judge did not err in overruling the plea of justification, so as to deny the plaintiff in error the right to open and conclude. The plea is not a plea of justification. It only admits the killing; it admits nothing on which the defendant in error could recover without more; it does not admit either that her husband was not at fault or that the company was, so as to take any burden off the shoulders of the defendant in error, who, being an employee's wife, must show either the one or the other before any recovery can be had, or any presumption be made against the company.

Besides, if it did, it would not be a good plea of justification, because the general issue of not guilty would admit all the evidence which plaintiff in error could introduce under the alleged plea of justification. Chapman v. Atlanta & West Pt. R. R., 74 Ga. 547 [a turntable case].

4. It is not an open question that the Carlisle tables are evidence in the courts of this State. The conclusiveness of the

i. See note of the Harper case, page 141, *ante*.

evidence or the degree of its weight are different matters. That they are not conclusive, nobody questions; but they furnish data on which the jury may act, and make a circumstance to be weighed by them.

5. The charge excepted to in the fourth ground of the motion, read in connection with the entire charge in the record, is not error. In summing up on the issue of the engineer remaining on the engine or jumping off to save his life, the judge, in our opinion, put the issue fairly before the jury in charging to the effect that if, in the emergency upon him, he believed, and had reason to believe, that in sanding the track, or otherwise working the engine, he could prevent the collision and save life, and it was necessary to that end that he remain at his post in this moment of danger, then the defendant in error could recover; but if it was not so necessary, and he knew it, or ought to have known it, then she could not recover on this issue.

6. The refusal to charge the several requests embodied in the fifth, sixth and seventh grounds of the motion, is not deemed sufficient to authorize a new trial, when considered with the clear, concise and able charge of the fair-minded and upright judge who tried the case. A more complete and correct, a more luminous and more easily understood charge to a jury on the law applicable to the facts of the case, it would be hard to find in the books or hear from the circuit judge, and it strikes us as impartial, as it is in other respects excellent.

7. We all think the case closes on the issues of negligence in the company and negligence in the deceased, but my brethren think that the evidence is sufficient to uphold the verdict on those issues. I incline to the opinion that the facts make one of those accidents incidental to the business in which the deceased was engaged, with no appreciable fault in the deceased, or in the other employees; and while the catastrophe is to be deplored, it is difficult to see that aught but accident incidental to the business of an employee of the company, caused his death; and therefore, his unfortunate widow has hardly made a case for recovery.

8. In respect to the issue of avoiding the catastrophe by leaping from the engine to save his life, we all agree that at such a moment, in charge of such a train, in view of passenger cars in his front, full of human life, to remain at his post in the hope of saving other lives would be an act of heroism so exalted as to

constrain approval from all human hearts, and that courts, however cold and calm duty requires them to be in all cases, should place themselves in the position of the engineer at the moment of such imminent danger, demanding such instantaneous decision and action, and should not scan closely the grounds of hope he may have had to save others, though risking himself in the effort. It is the policy of the carriers, as well as that of the great public carried rapidly by the trains, not to encourage the officer in charge of the engine that moves those trains to abandon his post in the moment of danger, but to reward the courage of remaining, if there be a hope, however slight, of saving two trains from collision and wreck and the lives of hundreds aboard. Whilst, if there be no shadow of hope of averting disaster to others, the engineer should save himself; yet on a hope, however faint, for reasons, however inconclusively establishing the soundness of his conclusion that by risking his own life he would probably save other lives, he should remain at his post; and the act of heroism, though inoperative of good either to himself or others in the particular case, should be regarded as martyrdom to public policy, rather than want of precaution to save himself. No man needs much encouragement to save his own life. "Self preservation is the first law of nature." It requires kinship to Christ to die, or to risk death, to preserve the lives of others.

The reasoning of the Supreme Court of Wisconsin, in Cottrell, *Adm'r, v. Chicago, M. & St. P. Ry. Co.*, 47 Wis. 634, strikes us with great force, and the great principle of public policy alluded to above cannot be better enforced and illustrated than by citations from the opinion of the court in that case. The court there say: "The very employment of the locomotive engineer, with its manifold and sudden and unexpected dangers, requires the highest type and best qualities of true manhood, invincible bravery, and great integrity \* \* \* They are placed in charge of one of the mighty forces of nature, held in servitude by the most dangerous and intricate machinery, and great skill, unremitting attention, sleepless vigilance and fearlessness of danger are required to keep them in constant control. \* \* \* The question which should determine their reasonable care or want of care is, how careful and prudent locomotive engineers would ordinarily and commonly act at such a time, in such a place and such circumstances, and not how firemen or other employees would or should. \* \* \* It will not do to establish a rule by

which the duty of an engineer in such an emergency may be measured and dictated by cowardice and timidity, and by which his standing at his place and facing danger will be carelessness and negligence. Who shall sit in judgment upon this brave engineer, to coolly determine the alternative risks and chances which he is compelled to take instantly, with scarcely a moment for deliberation, in such a terrible emergency? The defence resting upon such a theory in this case cannot be sanctioned, although cases may possibly arise in which even the common prudence of an engineer might require him to leave his engine to escape danger; but such cases will be rare exceptions, and depend upon very peculiar circumstances."

The facts of that case are quite similar to this. There, as here, the fireman jumped and saved his life. There, as here, there was imminent danger of a collision. There, as here, it did occur, and the engineer was killed, with hand on throttle, trying to check and control his powerful machine. There the decision is squarely that the defence was untenable. And we hold, with that court, that it must be clear, from the facts, that the engineer could not with any degree of probability, be of service at his post, before courts should hold it want of common care for him to brave danger and stand at his post. Judgment affirmed.

ENGINEER INJURED IN DERAILMENT — LAW OF PLACE — STATUTE — COMMON LAW — EVIDENCE — *RES GESTÆ* — DAMAGES — INSTRUCTION. — In **KROGG v. ATLANTA AND WEST POINT RAILROAD ET AL. (AND VICE VERSA)**, 77 Ga. 202 (*October Term, 1880*), engineer injured in derailment, the official syllabus states the case as follows:

"1. In a suit against two railroad companies, testimony was offered that the general manager, who had full control of the roads and all the employees upon them, and who had no superior officer as to the management of the cars, engines and tracks, and whose duty it was to know everything connected with the road and to keep everything in proper order, was informed by the conductor of a train on which he was riding that the train on which the plaintiff was at work had been wrecked, and where it had occurred, and thereupon remarked that he had told the roadmaster that those curves were too high; also that he went to the scene of the wreck, and after examining as to its cause, and while pursuing his investigations, went to the plaintiff, who was the engineer of the wrecked train, and asked him what, in his opinion, caused the wreck; that

the plaintiff said he thought it was a broken rail; but was not positive; that the general manager said that the plaintiff was mistaken; that the plaintiff asked him, as he had made an examination since the wreck, what, in his opinion, caused it, to which the general manager responded that it was too much elevation on the curve; that the plaintiff asked if he was positive about it, to which the general manager responded, yes, he knew it, and that thereafter he would remedy that, and would have no more such accidents from that fault: *Held*, that these admissions or statements of the general manager were admissible in evidence. He was the *alter ego* of the corporation in this matter. His statements as to the condition of the road were made while in the line of his duty, it being his business to know the condition of the road, and upon being informed by an agent of the road of the wreck, what he then said was *dum fervet opus*. It was admissible also as showing knowledge of the corporation as to the improper construction and condition of the road before the accident.

"(a.) The statements of the general manager to the plaintiff were admissible further as part of the *res gestæ*, it being his duty to investigate the cause of this disaster, and such statements being made while he was pursuing his inquiries.

"(b.) The grant of a new trial, on the ground that such evidence should not have been admitted, was erroneous.

"2. This court is not bound by the interpretation of the common law made by the courts of Alabama, although the injury for which suit is brought occurred in that State, but this court will decide what is the common law. As to the construction which the courts of that State place upon its own statutes or other local laws bearing upon the case, this court will follow their decision.

"(a.) What the decisions of the courts of Alabama are on the question of the liability of the master for an injury done to one servant by the negligence of another, and who are fellow-servants, is left in some doubt.

"3. A fellow-servant is one employed about the same work with the servant injured and whose negligence caused the injury to the servant complaining.

"4. If a railroad company knows of the improper construction of its road-bed, and that the cross-ties and other superstructure are rotten, and if the company fails to make suitable repairs, this is negligence on its part, and it will be liable for any injury that might occur on that account to any one, whether a servant of the corporation or not, notwithstanding that the failure to repair was owing to the negligence of the general manager and superintendent

of the road, or the road-master or section-boss. If the unsoundness of the roadway be known to the officers of the company who are charged with the duty of repairing it, this would be notice to the corporation.

" 5. While as to a right of action given by the statutes of Alabama, the statute of limitations of that State might apply to an action brought in Georgia, yet where a right of action arose at common law, such would not be the case, but the statute of limitations of the place where suit was brought would govern.

" 6. While in one part of the charge the judge erroneously stated that the jury would be authorized to reduce the damages if they saw proper, yet in other portions of the charge this inaccuracy was corrected, and no harm resulted from it."

Plaintiff had a verdict in the City Court of Atlanta for \$15,000. Defendant moved for a new trial on twenty grounds, the motion being sustained on one ground only, and the plaintiff excepted. Defendant filed a cross-bill of exceptions, assigning error on the refusal to grant a new trial upon all the grounds taken in the motion. The Supreme Court affirmed the judgment in refusing to grant new trial upon the grounds taken in the cross-bill and reversed judgment on main bill of exceptions.

**ENGINEER RUNNING TRAIN INTO WASHOUT — ACT OF GOD — RAILROAD NOT LIABLE — PRACTICE — STRUCK JURY — EVIDENCE — INSTRUCTION.** — In **CENTRAL R. R. & BANKING CO. v. KENT**, 87 Ga. 402 (*March Term, 1892*), engineer injured by train running into washout, judgment for plaintiff in the Bibb Superior Court was reversed. The grounds of reversal are stated in the official syllabus as follows:

" 1. A railroad company which has performed the duty of inspecting and keeping in safe condition its tracks and road-bed with that degree of diligence which the law requires of it, is not liable in damages to one of its engineers for injuries occasioned by running his engine into a washout or chasm caused by a sudden, most violent and unprecedented rainfall, such as the oldest inhabitants of the neighborhood had never before witnessed, the calamity being directly attributable to the act of God, for which no individual or corporation is ever held responsible.

" 2. After a jury has been stricken to try a cause, it is not error to refuse to allow a restriking because counsel for one of the parties simply states in his place that he had by oversight left on the jury a man who, for reasons alleged, would, in his opinion, be partial and prejudiced against his client, it not appearing that even if these

things were true, any diligence had been shown to ascertain the same, or that they might not easily have been known by proper and timely inquiry.

" 3. Upon the trial of an action for personal injuries against a railroad company by one of its engineers, after admitting evidence tending to show that such engineer was experienced and reliable, it was error to charge that, as throwing light on the question whether or not he was to blame, the jury might consider his character as an experienced and reliable engineer, if such character had been shown by the testimony, the evidence mentioned not being relevant upon this particular issue.

" 4. Whether or not an engineer exercised proper diligence in looking out for defects in the track, is a question for the jury, in determining which they should take into consideration the various other duties which he was required to perform in managing and running his engine, the state of the weather, and all other pertinent facts shown by the testimony.

" 5. When, in its charge, the court mentions and emphasizes a certain issue, and informs the jury that the pressure of the case is upon that issue, it should be careful not to use in this connection language which may confine the jury, in the determination of this important issue, to a portion only of the facts and circumstances pertinent thereto, but on the contrary, should so frame its instructions that they may, in arriving at the truth, have in mind and give proper weight to the theories of both sides, and the proof offered in support thereof. Hence, where the court, in charging upon a vital question, as above set forth, calls attention in detail to particular facts favorable to one side, it would be better to call attention in like manner to the facts favorable to the other side, instead of using, as to them, general terms which, however intelligible to a trained legal mind, may not impress as intended the minds of jurors, who are non-professional men." (BLECKLEY, Ch. J., *dissented*.)

A subsequent appeal in the KENT case resulted in *verdict for plaintiff being set aside and the case dismissed*. See 91 Ga. 687.

In CENTRAL R. R. & BANKING CO. v. KENT, 91 Ga. 687 (*March Term, 1893*), engineer injured by running locomotive into a washout, the official syllabus (point 1) says: "This case has already been twice before this court. According to the opinion of the majority of the court when it was decided the last time, there should not, upon the actual merits of the case, have been any recovery against the railroad company. A third verdict having been rendered in favor of the plaintiff below upon substantially the same facts, it must be set aside; and as it is manifest, in view of the repeated

trials which have taken place, that the plaintiff can never show a materially different state of facts, direction is given that the case be dismissed."

See also former appeal in the KENT case, 84 Ga. 351.

In CENTRAL R. R. Co. v. KENT, 84 Ga. 351 (*February, 1890*), engineer injured by his engine being precipitated into an open excavation in the road, caused by giving away of the embankment of earth on which the track was laid, caused by alleged washout, judgment for plaintiff in the Bibb Superior Court was *reversed*, on the ground, among others, that the question whether the company was negligent in not knowing of the washout, so as to have given plaintiff due notice thereof, should have been submitted to the jury.

**ENGINEER KILLED IN COLLISION BETWEEN ENGINE AND BOX CARS—CONTRIBUTORY NEGLIGENCE.** — In EAST TENNESSEE, VIRGINIA & GEORGIA R'Y CO. v. KANE, 92 Ga. 187 (1893), engineer killed in collision between engine and certain box cars standing upon a side track, judgment for plaintiff in the City Court of Macon was *reversed*, for several errors on the trial and also contributory negligence of deceased. Among the several rulings of the court, as shown in the official syllabus, are the following:

" 6. The mere fact that a railroad company fails to recover from a discharged employee a key which controls the turning of a switch, is not of itself sufficient to make the company liable for the criminal act of such employee in maliciously misplacing a switch for the purpose of wrecking a train. The company is not bound to anticipate that, purely out of revenge for his discharge, a former employee might secretly commit so heinous a crime against it and the public. Nor is the company bound to exercise constant vigilance to prevent all persons whatsoever not in its employ from having the means or opportunity of tampering with its switches or its tracks. Whether or not in any particular case the company exercised the proper degree of care in protecting its switches from interference, is a question for the jury, in determining which they may look to the evidence to ascertain if there was any reason for the company to apprehend such interference, and if so, whether under all the circumstances, it used due diligence in endeavoring to prevent the same. In its charge to the jury, the court should not state or assume that a given state of facts would show negligence on the part of the company in the respect indicated. [Citing Keeley v. Erie R'y Co., 47 How. Pr. (N. Y.) 256.]

" 8. According to the undisputed facts, the plaintiff's husband

was guilty of negligence in running his train in violation of the rules of the company, of which he had knowledge, and which he had agreed, upon entering its employment, to obey. For this reason, and because of errors committed by the court, there should be a new trial; and if, upon the next hearing, the evidence is substantially the same, there should be a verdict for the defendant."

ENGINEER KILLED IN COLLISION OF HIS TRAIN WITH CARS STANDING ON SIDE TRACK — NEGLIGENT SWITCHING — RULES — SCHEDULE — RAILROAD LIABLE. — In **WESTERN & ATLANTIC R. R. CO. v. BUSSEY ET AL. (BY NEXT FRIEND)**, 95 Ga. 584 (*October Term, 1894*), engineer killed in collision, judgment for plaintiffs in the City Court of Atlanta for \$6,000 was affirmed. The syllabus by the court states the case as follows:

" 1. Where under the provisions of section 3893 *et seq.* of the Code, depositions of a witness are taken for use in a cause then pending, at the trial of such cause the depositions so taken may, in the discretion of the court, be read in evidence notwithstanding the presence of the witness at the trial.

" 2. Rules prescribed by railroad companies for the government and direction of their employees in the discharge of their duties, and for the non-observance of which an employee forfeits a right of recovery which otherwise would accrue to him, are to be strictly construed against the company, and will not by implication be extended beyond their clear and obvious meaning.

" 3. Although a rule of the defendant railroad company prohibited the running of its trains above a certain rate of speed at a given switch point, it was not error to refuse a request to charge that it was the duty of the engineer to 'slacken' the speed of the train at such point; the request leaving out of consideration the rate of speed at which the train in question was actually being run at such given point at the time the collision occurred which resulted in the injury complained of.

" 4. Notwithstanding a rule of the defendant company requiring all trains to stop at *schedule* meeting and passing points, the court did not err in refusing a request to charge that it was the duty of the engineer to stop his train at the point where the collision occurred, it not appearing that the same was either a schedule meeting or passing point. Nor did the court err in charging the jury that the engineer under such rule could pass other than schedule meeting and passing points 'at such rate of speed as common prudence dictated as safe.'

" 5. Where a rule of the company enjoined upon a co-employee of

the plaintiff the performance of a particular duty, such co-employee was bound to exercise ordinary care in the discharge of that duty; and it is not cause for reversal that the court charged the jury, that if such co-employee failed to exercise ordinary care in discharging such duty, they 'ought to find the defendant company negligent in that regard.'

" 6. A special bulletin order regulating the speed of trains when passing certain particular switch points designated therein, has no application to switch points generally; and in the absence of evidence showing that the point at which the disaster occurred was of the particular class of switch points embraced within the terms of such order, the court did not err in charging the jury that this order could have no application to the point in question.

" 7. Where a special order of the company prohibited the running of trains at a greater rate of speed than twenty miles per hour at a given switch point, the court did not err in charging the jury as follows: 'If [the engineer] was not running faster than twenty miles per hour when he passed the switch, you ought to find that he did not violate the bulletin order mentioned, even though he ran faster than that at a point further back on the track.'

" 8. Where a rule of the company prohibited generally the use of intoxicating liquors by its officers and employees, the use thereof by an employee who sues for personal injuries would not defeat a recovery, unless such use contributed in some appreciable degree to producing the injury sustained. That the violation of such rule might have done so, if it did not in fact so contribute, would not defeat a recovery. The court therefore properly charged the jury, 'that if such employee violated the rule in question, the presumption would arise that such violation contributed to produce the collision, and the burden of proof was on him to show that it did not so contribute, directly or indirectly.'

" 9. The charge of the court upon the measure of damages and upon the rules for computing the same, was in the main correct; and that the trial judge omitted to inform the jury that in the annuity table there were two columns, one designed for computing interest at six, and the other at seven per cent, is no cause for the reversal of a judgment refusing a new trial, it appearing that the amount of damages recovered is not at all excessive, and clearly within the sum to which the plaintiff would be entitled if computed under either rate per cent.

" 10. The charge of the court, as a whole, was full, fair, and, in all essential respects, free from error; the verdict, upon careful

review of the evidence is fully warranted, and, having been approved by the presiding judge, will not be disturbed."

The facts in the BUSSEY case were as follows: "Mrs. Bussey sued the defendant company for damages because of the homicide of her husband, alleged, in substance, to have been caused by the negligence of the agents of the defendant in turning one of its switches to a side-track upon which one of the trains of the company was standing, and in so leaving the switch as that when the train upon which her husband was the engineer was due arrived at that place, his engine took the side-track and collided with the train thereon; and because the defendant was further negligent in that, it being dark at the time of the collision, its servants gave no warning, by switch lights or otherwise, of the condition of the switch. The declaration further alleged that the engineer who was injured was free from fault. The original plaintiff having died pending the action, the present plaintiffs, who were the children of herself and her deceased husband, were made parties plaintiff by their next friend. Upon the trial of the case, many questions of fact and law arose which involved the interpretation and application of certain rules adopted by the railroad company for the government of its employees." \* \* \* The foregoing syllabus sufficiently states the points decided.

## PITTS v. FLORIDA CENTRAL & PENINSULAR RAILROAD COMPANY.

*Supreme Court, Georgia, March, 1896.*

[Reported in 98 Ga. 655.]

**FIREMAN THROWN FROM ENGINE BY SUDDEN RELEASE OF BRAKES — DEFECTIVE APPLIANCE — KNOWLEDGE OF DEFECT — PRACTICE — ERRONEOUS NONSUIT.** — Where an action is brought against a railroad company by one of its employees for personal injuries alleged to have resulted from the negligence of the former in furnishing for the use of the latter defective machinery and appliances, in the use of which, without fault on the part of the latter, he was injured, and a motion for a nonsuit is made at the close of the plaintiff's case upon the sole ground that, admitting the defendant's negligence, the defect complained of was so apparent and the use of the appliance so manifestly dangerous as that the plaintiff knew, or by the exercise of ordinary diligence could have known, not only of its existence, but of the danger attendant upon its use, and was consequently himself guilty of contributory negligence in continuing the use of such appliance, in determining whether the nonsuit moved should be awarded, knowledge of the defect and of the dangerous character of the

appliance are both necessary considerations; and even though it might appear that the defect was known to the employee, a nonsuit should not be awarded, unless it further appeared either that the plaintiff actually knew that the continued use of the defective appliance was dangerous, or that the defect complained of rendered the use of the appliance so obviously dangerous as that a person of his intelligence and understanding could readily perceive the danger. If in such case, upon the question of notice, whether actual or imputed, either as to the defect or the dangerous character of the defective appliance, the evidence be in conflict or inferences therefrom may be drawn favorable to the plaintiff, non-liability of the defendant cannot be adjudged as matter of law.

2. If upon the conclusion of the argument of a motion for a nonsuit the plaintiff so amends his declaration as that the facts, newly alleged, if proven, would entitle him to recover, it is error for the presiding judge either to refuse a motion by the plaintiff to reopen the case to allow the submission of additional evidence in support of the amendment, or to impose upon the plaintiff as a condition to the grant of such a motion that he shall not himself be further sworn as a witness, and this is true, even though he had previously deposed to facts in apparent conflict with the facts alleged in the amendment to the declaration. The right to introduce competent evidence, from whatever source it may come, which will prevail against a motion for a nonsuit, is a substantial right of the plaintiff and should not be denied by the court (1).

**SIMMONS, Ch. J., concurring.** — Upon the merits of the case as it stood when the evidence closed, it would have been proper to grant a nonsuit; but the court, after permitting the plaintiff to amend his declaration, erred in

1. On this point the court said: "This doctrine was recognized in the case of *McColgan v. McKay*, 25 Ga. 632. In that case after the plaintiff had closed, the defendant moved a nonsuit which was granted. The plaintiff moved to be allowed to open his case and submit other evidence, the effect of which would have saved a nonsuit; this was refused by the court and the plaintiff's cause dismissed. This judgment was reversed, and Benning, J., speaking for the court, says: 'It is almost a matter of course to let in evidence upon a point to save a nonsuit. The practice is commended by every consideration of expediency.' In a later case, *Parker v. Fulton Loan & Building Ass'n*, 42 Ga. 456, this court approved the doctrine of the case last above referred to, and again reversed the trial judge for refusing to open the case to receive evidence the effect of which would have saved a nonsuit."

The court also stated the English rule in the case of *The King v. Teal, et al.*, 11 East, 307, 311 (1809), the question being as to whether one who admits himself to be an infidel is disqualified from giving evidence, where Lord Ellenborough said: "An infidel cannot admit the obligation of an oath at all, and cannot therefore give evidence under the sanction of it (*Curtiss v. Strong*, 4 Day, 51). But though a person may be proven, on his own showing, or by other evidence, to have forsaken himself as to a particular fact, it does not follow that he can never afterwards feel the obligation of an oath; though it may be a good reason for a jury, if satisfied that he had sworn falsely on the particular point, to discredit his evidence altogether. But still that would not warrant the rejection of the evidence by the judge; it only goes to the credit of the witness, on which the jury are to decide."

refusing to reopen the case in order to allow him to prove by his own testimony the allegations of the amendment, the credibility of the witness being for the jury and not for the judge.

- LUMPKIN, J., *dissenting*. — 1. It plainly appearing from the plaintiff's evidence as a witness in his own behalf, that before receiving the injuries complained of in his declaration, and which resulted from the defective condition of the engine upon which he was at work, he knew of the existence of the defects, and also knew — or, in the exercise of ordinary diligence, ought to have known — of the danger attendant thereon, that he nevertheless remained in the service of the company, and that his so doing was in no way attributable to any promise or agreement to have the engine repaired, it was clearly a case for the granting of a nonsuit.
2. When it became apparent to the plaintiff, after the evidence had been closed, that a nonsuit would be granted, and he thereupon filed an amendment to his declaration, the allegations of which were palpably at variance in vitally important particulars with what he had already sworn as a witness with reference to matters concerning which he could not be mistaken, the court did not err in refusing to allow him to again take the stand for the purpose of "proving" the allegations of the amendment, and thus changing the entire character of his case, and putting himself in the attitude of swearing falsely in order to save a failing cause.

(*Syllabus by the court.*)

**APPEAL from judgment of nonsuit in the City Court of Savannah. *Judgment reversed.***

Pitts sued the railway company for personal injuries sustained by him while in its employment as a fireman on a locomotive. He was nonsuited; to which ruling, and to the refusal of the court to permit him to testify in support of an amendment he made at the trial, he excepted. The declaration alleged that the company negligently permitted the engine on which he was employed to become unsafe, in that the drawbar or coupling necessary to connect the tender to the engine had, from long and constant use and inattention, become worn, defective and insufficient; whereby the space between the tender and the engine became so great that when the engine was stopped or started the tender was propelled and driven with great force against the chafing iron of the engine itself; and that on September 30, 1894, while he was performing his duties without fault and in the exercise of ordinary and reasonable diligence, standing upon the apron of the engine, the engineer suddenly and without warning applied and released the brakes, and by reason of the defective drawbar or coupling the tender was thrown with great force against the engine, knocking the iron apron from beneath plaintiff's feet, and hurling him backward from the engine to the ground.

At the trial plaintiff introduced two witnesses whose testimony tended to show, in brief, that there should be little or no space between the tender and the engine proper; that where such space exists it is covered by a flat piece of iron called an apron, which, if the floor of the tender be higher than that of the engine proper, should be somewhat curved to prevent it being knocked upward by any sudden movement; and that the engine is in unsafe condition with such space between it and the tender. Plaintiff testified that at the time of the injury the engine was moving four or five miles an hour at night. It was a shifting engine. He had been employed thereon but a short time, more than a week, about fifteen days. He was standing on the apron in order to get open the door of the fire-box, when the apron flew up and knocked him backward from the engine to the ground, producing the injuries complained of. The floor of the tender was an inch or an inch and a half higher than that of the engine proper, and the apron was what he would call flat, almost so. He is not a machinist, and does not understand the machinery of an engine. One or two days before he was hurt he saw the space between the engine and the tender (which he estimated to be three or four inches); when Crowley, the foreman, and Burton, the master-mechanic of the company, were coming over on this engine Burton raised up the apron and then told Crowley to take the engine in, repair it by taking up the slack, and have the boiler washed out. Plaintiff expected every day that the engine would be taken in and repaired. He could not open the door of the fire-box without standing where he stood on the apron. The whole cause of the injury was the slack between the tender and engine, the knocking up of the apron. He had been firing an engine about a year; had been thrown around one off and on, but not as a fireman, since 1882. He did not know the slack between the engine and tender was dangerous until he was hurt. He never saw the apron fly up before his injury; does not say it did not fly up. The reason he did not see it fly up was he paid no attention to it. He did not consider it dangerous, but after Crowley and Burton spoke of it he noticed it so as to learn all he could about machinery. He did not quit the road when he noticed it; wanted to stick to his job; had a family to support; does not think he would have quit on account of this space; did not know of any danger on account of it; did not think it would hurt a man. The promise to repair did not induce him to stay

on the engine; he stayed to make a living. What Burton told Crowley had nothing to do with his staying there, for he did not know of the danger of the drawbar; could not tell anything about the matter. One could see the slack if on the ground, and notice it when a coupling was made; but he was looking out for signals and did not watch the fireboard. He saw this same engine after the injury; the slack had been taken up, and was nearly tight; it had been repaired, and there was no play between tender and engine.

The amendment which was offered and allowed, alleged that about September 28, 1894, while plaintiff was employed as fireman, Crowley the foreman, and Burton the master-mechanic of defendant, being on said engine, stated in plaintiff's presence, while in the act of examining the engine, that it must be repaired at once; and Burton then and there instructed Crowley to have the engine repaired by taking up the space between the engine and the tender, thus curing the defects herein complained of. Crowley thereupon said he would at the earliest moment repair the defects; and plaintiff, believing and relying upon the promise and assurance of Burton that the defect would be repaired, remained upon the engine until September 30, when he was thrown therefrom by reason of its defective condition, sustaining the injuries complained of. While he was not aware that the defects in the engine were dangerous, until after his injury, yet had he known of the dangerous condition caused by said defects, he would, on account of said promise and assurance of Burton and Crowley that the defect would be repaired, have remained on the engine in the capacity aforesaid. From the time of said promise and assurance to the date of the injury, he of right could and did believe that defendant would have the engine repaired; but defendant disregarded said promise and assurance and did not repair the engine, but allowed it to remain so defective, etc.

Plaintiff then offered to testify to the facts alleged in this amendment. His testimony was excluded on the ground that it would be improper to allow him to testify further on these points, the court offering to receive such testimony from any other source.

J. G. & D. H. CLARK, for plaintiff.

DENMARK, ADAMS & FREEMAN, for defendant.

Atkinson, J., delivered the opinion of the court reversing the

nonsuit, in which SIMMONS, Ch. J., concurred, the points of which are fully stated in the syllabus by the court. LUMPKIN, J., dissented, in a separate opinion, the points of which are stated in the syllabus.

FLAGMAN INJURED WHILE COUPLING CARS TO TRAIN — SUDDEN BACKING OF TRAIN — SIGNAL — MEASURE OF DAMAGES — MORTALITY TABLES — ERRONEOUS CHARGE. — In FLORIDA CENTRAL & PENINSULAR R. R. CO. v. BURNEY, 98 Ga. 1 (1895), judgment for plaintiff in the Glynn Superior Court was *reversed* for misleading and incorrect instruction as to use of mortality and annuity tables. The facts of the case are as follows: Burney was employed by the railroad company as a flagman and car-coupler upon a construction train, and was injured by the negligence, as he claimed, of the fireman in running back a part of the train suddenly and rapidly against him while he was preparing to couple it to the other part, after a signal to stop had been given and before a signal to move was made; and, as he further claimed, by the negligence of the company in allowing the engine to be run by the fireman in the engineer's absence by permission of the company. The injury consisted in the crushing of plaintiff's right arm (he being right-handed) so that it became practically useless for work. He was 21 years of age, in good health, and earning \$1.45 per day; but was uneducated, and was rendered unable to labor. His medical expenses were \$100. The evidence upon the issue of negligence and contributory negligence was conflicting. The jury found for the plaintiff \$12,108.33, and the company moved for a new trial. Before decision on this motion, plaintiff's counsel applied for leave to write off \$3,108.33 from the verdict. This was granted and the motion for new trial was overruled. The main assignments of error in the motion are upon instructions given by the judge to the jury as to the use of the Carlisle mortality and the annuity tables in evidence, given on the authority of the tables appended by the official reporter (J. H. Lumpkin, Esq.) in volume 70 of the Georgia Reports. See 70 Ga. 843-848. CROVATT & WHITFIELD and DENMARK, ADAMS & FREEMAN, appeared for plaintiff in error; FRANK H. HARRIS and SYMMES & BENNETT, for defendant in error. The opinion was rendered by LUMPKIN, J., the points decided being stated in the official syllabus to the report as follows:

" 1. The charge of the court as to the methods of using the mortality and annuity tables was incorrect and misleading, and the error thus committed was not, in view of the evidence and the

amount of the verdict rendered in the present case, cured by allowing the plaintiff to arbitrarily write off a portion of the recovery.

" 2. In an action against a railroad company by an employee for personal injuries alleged to have been occasioned by the negligence of a co-employee, no presumption of negligence arises against the company until the plaintiff has affirmatively shown that he himself was free from fault."

#### Note on Annuity and Mortality Tables as evidence on Question of Damages.

In connection with the preceding case of Florida Central & Peninsular R. R. Co. v. Burney, 98 Ga. 1, the following note may be of interest on questions relating to the admissibility of Mortality or Mortuary Tables as evidence on measure of damages in personal injury cases:

*Mortality Tables.* — In 70 Ga. 843-848, there is a valuable appendix on MORTALITY TABLES showing the Carlisle, Northampton and Actuaries Mortality Tables, together with the Annuity Table based on the Carlisle Table, which the official reporter (J. H. LUMPKIN, Esq.) collated from the several tabulations by experts and also from Reese's Manual, and Insurance authorities.

See Central R. R. v. Harris, 76 Ga. 501 (1886), a crossing-accident case, where the trial court charged on the submission of the several annuity tables as evidence on the question of damages, particularly calling attention to the mortality tables given in 70 Ga. 847.

See also 38 Ga. 409; 41 Ga. 223; and 71 Ga. 446, as to admissibility of mortality tables in evidence.

See Crusselle v. Pugh, 67 Ga. 430 (1881), as to use of tables of mortality to base expectation of life.

See also Ga. R. R. v. Pittman, 73 Ga. 325 (1884), for instruction as to use of mortality tables on question of damages.

*Carlisle Table.* — In Central R. R. Co. v. Crosby, 74 Ga. 737, the Carlisle Tables were held admissible as evidence bearing on the measure of damages.

*Northampton Tables.* — In Georgia R. R. & Banking Co. v. Oaks, 52 Ga. 410 (1874), it was held that it was proper to permit the Northampton Tables to be put in evidence as bearing on question of damages in action for homicide of plaintiff's intestate, an engineer in the employ of the railroad company.

*Annuity Tables.* — Reese's Manual of Annuity Tables held admissible as evidence on question of damages, in Atlanta & West Point R. R. Co. v. Johnson, 66 Ga. 259 (1881).

In Central R. R. & Banking Co. v. Nash, 81 Ga. 580 (1888), it was held that annuity tables were properly admitted as evidence on measure of damages.

In Florida Central & Peninsular R. R. Co. v. Burney, 98 Ga. 1, the court suggested forms for instructions relating to annuity tables, etc., which are printed in the official report (98 Ga. 6-14).

*Life Tables.* — See also Central R. R. v. Thompson, 76 Ga. 770 (1886), injury to alighting passenger, where it was held that "the jury is not confined to any procrustean rule in measuring the value of a life. The life-tables are an aid to that end, but age, health, habits, and the money one is making, are also data from which a conclusion may be drawn."

Tables proved to have been used by life insurance companies by one who has

been in the business for years, though not claiming to be an expert as to the tables, are admissible to show the probabilities of the duration of life. *Central R. R. v. Richards*, 62 Ga. 306 (1879).

In *Boswell v. Barnhart*, 96 Ga. 521 (1895), it was held (as per paragraph 4 of the headnote) that "a jury, when there are sufficient facts in evidence as to the age, health, physical condition, habits, etc., of a given person, may form a reasonable estimate as to the value of the life of such person, without resorting to the standard mortality tables usually introduced in evidence in cases of this kind" (action for death of convict employee).

**FLAGMAN INJURED — FALL OF STOVE IN CAR — DERAILMENT — CONTRIBUTORY NEGLIGENCE.** — In *ATLANTA & CHARLOTTE AIR LINE R'Y v. RAY*, 70 Ga. 674 (*February, 1883*), flagman injured by stove falling on him which was in car which was derailed, judgment for plaintiff for \$6,500 in the City Court of Atlanta was *reversed* for several errors. The points decided by CRAWFORD, J., are fully stated in the official syllabus to the report, as follows:

" 1. The object of § 3938 of the Code in limiting the service of a juror to four weeks in any one year is two-fold; first, to equalize the burden of jury duty; and second, to avoid the evil of 'professional jurors;' and it should be strictly and energetically enforced for those purposes.

" (a.) Although a juror may have served four weeks during a term of court which began in December, yet he would not thereby be disqualified from another week of service in the succeeding year, although at the same term, which continued into the new year. The prohibition is against service for more than four weeks in a year, which means a calendar year.

" 2. On the trial of an action for damages by an employee of a railroad against the company, based upon the insecure fastening of a stove in one of its cars, resulting in damage to the plaintiff, it was not error against the defendant to charge that it was not liable unless it 'knew or should have had reason to know' that the stove was in an unsafe condition.

" (a.) The duty rested on the company to properly select and superintend its operatives, its machinery, appliances and appointments of every sort used in its business. It was a guarantor that all reasonable and proper care had been and should be exercised in the performance of those duties, and its liabilities should be limited to a failure to meet its obligations in this respect.

" 3. If it was the duty of a flagman to make fires in the stove on one of the cars of a railroad company, which he did; and if there was a defect in the manner in which the stove was fastened, such

as to make it unsafe to build a fire therein on account of the dangers incident to railroad traveling; and this was such an open and patent defect as he could easily have seen, but on account of his own negligence he carelessly overlooked it and failed to report it that it might be remedied, then he was guilty of contributing, by his own negligence and carelessness, to the injury which he received, and was not, therefore, entitled to recover.

" 4. A flagman on a railroad whose place was in the rear car when in motion but who had duties which, on occasion, might call him to other parts of the train, having brought suit against the railroad company for an injury received while he was in another portion of the train, resulting from the overturning of a stove in the car where he was, it was necessary for him to show affirmatively that, at the time he was hurt, his duty required him to be at the place where the injury occurred.

" (a.) That, by reason of the shock or the lapse of time, the plaintiff has lost the memory which would enable him to establish this fact, is his misfortune, but does not vary the law."

MINOR EMPLOYEE, A TRAIN-HAND IN EMPLOY OF ONE RAILROAD COMPANY, RIDING ON TOP OF CAR, KNOCKED OFF AND KILLED WHILE PASSING UNDER A BRIDGE CROSSING THE TRACK OF ANOTHER RAILROAD — PLEADING AND PRACTICE — *STARE DECISIS* — AMENDMENT — LIABILITY OF RAILROAD OWNING TRACK. — In **ELLISON v. GEORGIA R. R. CO. (AND VICE VERSA)**, 87 Ga. 691 (*October Term, 1891*), appeals by both parties in action brought in the Fulton Superior Court by Mrs. Ellison against the railroad company, the declaration alleged, in substance, as follows: On December 21, 1887, Morgan Ellison, her son, seventeen years old, without either wife or child, and who contributed to her support, was in the employment of the Central Railroad and Banking Company as a train-hand, and on the night of that day, in the proper exercise of his duties, was riding on the top of a freight-train of the Central railroad on the track of the Georgia railroad, and was in his proper place on the train where he had been ordered to go by the conductor of the train. While the train was passing under a bridge at a crossing over the Georgia railroad track of a street in Atlanta, her son was knocked off the train by the bridge and killed. At the time of the accident he was rightfully and legally upon the right of way of the Georgia railroad and with the consent of the defendant, and the Central railroad was rightfully using the track of the Georgia for shifting its trains within the city, by virtue of an

arrangement between the two railroad companies that the Central should so use the track and other tracks of the Georgia for such purposes, and the same was done with the license, knowledge, permission and consent of the Georgia, and in accordance with the long standing custom so to do. The train in question went upon the track of the Georgia for the purpose of transferring freight cars from the Central's track to a point in the city on the track of the Georgia. The night was extremely dark and her son entirely unable to see the bridge; and it was windy and cold, and defendant was negligent in that it had placed no lights or other signals at or near the bridge as, according to reason and prudence, it should have done. It knew that the bridge was a death-trap, having been put on notice of this by numerous and frequent accidents; it had recognized and acknowledged it to be such, and yet maintained this death-trap and suffered it to be over its track. Defendant knowing the bridge to be very dangerous, and acting under the advice of its regularly employed physician, had put up signals in the shape of ropes hanging from beams, about fifty yards on each side of the bridge, to prevent accidents; but defendant was negligent in that these ropes on the night of the accident were entirely gone or out of order and did not strike her son, defendant having allowed the ropes to rot down or to be pulled off, or become wrapped around the beams. Defendant was negligent in allowing so low a bridge to be over its track, for the bridge was only three feet and nine inches above the top of ordinary cars of defendant and the Central railroad company, and a much smaller distance sometimes. Defendant was negligent in that it allowed pieces of timber to dangerously project downward from the bottom of the bridge over the track, and thus increase the danger to persons on the top of cars passing under the bridge. Defendant owed a duty to her son and to the Central Railroad Company to furnish them a safe track and proper bridges, signals, warnings, etc., and her son was, as to defendant, a passenger, and defendant owed him extraordinary diligence, and is liable for his homicide as for that of a passenger. He was free from fault and in no way contributed to the bringing about of the homicide, which was entirely due to the negligence and default of defendant and its servants. He did not know of the danger, having been employed by the Central Railroad Company only one day before the accident and not being acquainted with the condition of the bridge and the absence of signals, and at the time in question he presumed and believed that the signal ropes were in good order, and as those over all other tracks of defendant and other railroads at the bridge were, and expected them to strike him as he passed

them and warn him to lie flat on the car. At the time of his death he was earning a sum stated and had good prospects for increasing his earnings, and his wages went to the petitioner's support.

The defendant demurred generally to the declaration, and in support of the demurrer insisted: 1. That upon the facts stated in the declaration it appeared that plaintiff's son was, at the time of the injury, on the train and in the service of another railway company, and also on a track which, for the time being, was and is to be treated as the track of another railroad company, and using at the time the franchise, not of defendant but of another, a different and independent railroad company, over which train and its movements and the servants operating the same defendant exercised no control, and for which or any injury to plaintiff's son, under the facts stated, defendant is not responsible. 2. That the declaration failed to allege that plaintiff was dependent on her son. The court overruled the first ground, but sustained the second. Before the judgment sustaining it was signed, plaintiff offered amendment alleging that she was dependent upon her son for support and that he contributed to her support, but defendant objected to this amendment on the ground that it added a new cause of action, and that there was no cause of action set out in the declaration to amend by. This objection the court sustained. [W. M. BRAY, E. M. MITCHELL and GLENN & SLATON, appeared for plaintiff; J. B. CUMMING, HILLYER & BROTHER and BRYAN CUMMING, for defendant.]

The opinion in the Ellison case was rendered by BLECKLEY, Ch. J., and the points decided are stated in the official syllabus as follows:

"1. Courts of final review are bound by the rule of *stare decisis*, both as a canon of public good, and a law of self-preservation; nevertheless, where a grave and palpable error, widely affecting the administration of justice, must either be solemnly sanctioned or repudiated, the maxim which applies is *fiat justitia ruat cælum*.

"2. Amendment is a resource against waste. It proceeds on the principle that it is better to preserve what has been done and improve it than to throw it away. There is as much reason for correcting important defects as the less important, and those of substance as those of form.

"3. Amendment of substance at an early stage has always been allowable as matter of judicial discretion. The Act of 1854 made it matter of right at any stage. The code does the same, 'provided there is enough to amend by,' and with a further restriction against adding new parties or new causes of action. The act made the

right at law as broad as in equity, and *vice versa*, and this feature is retained by the code.

" 4. As a declaration must contain all the substance requisite to enable the plaintiff to recover, no amendment of its form would be of any value without a complete cause of action in substance. Hence, in order for a declaration to be amendable in form, a substantial cause of action must appear, otherwise there is not enough to amend by.

" 5. But when the amendment needed is one of substance itself, 'enough to amend by' does not mean the same as 'enough to be good in substance without amendment.' On the contrary, failing to be good in substance is generally the reason why amendment of substance is needed. 'Enough to amend by' is to be determined by what is enough relatively to the particular amendment needed and offered. There may be enough to amend by in one respect, though not in another. The code does not make the standard for form and substance the same. In this regard, it has been misconstrued, and the case of *Martin v. Gainesville, J. & S. R. R. Co.*, 78 Ga. 307, based upon such misconstruction, is hereby overruled.

" 6. Enough to amend by in matter of substance, in aid of an incomplete cause of action is the last amount of substance in a declaration which will serve to show that, according to the original design of the pleader, what is offered to be added rightly belongs to the cause of action which he meant to assert, and that the addition proposed would make the cause of action complete. There must be a plaintiff, a defendant, jurisdiction of the court, and facts enough to indicate and identify some particular cause of action as the one intended to be declared upon, so as to enable the court to determine whether the facts proposed to be introduced by the amendment are part and parcel of that same cause. Any amendment whatever which, if allowed, would leave the cause of action incomplete should be rejected.

" 7. Under the code, a declaration which has all the requisites to make it good and sufficient in substance, save that it omits to allege some facts essential to raise the duty involved in the cause of action which the pleader evidently intended to declare upon, is amendable by supplying the omitted fact at any stage of the case. Thus, where the duty claimed was the duty of forbearing to obstruct a sewer-pipe which conveyed waste-water from the plaintiff's premises and discharged the same on the defendant's land, the declaration was amendable by alleging an easement subjecting his land to the burden of receiving the water so discharged. Also, in an action by a mother suing for the homicide of her son, where the fact

omitted from the declaration was that she was dependent upon him for support, the declaration was amendable by alleging that fact.

" 8. Where two railway companies, each under its own franchise, use the track of one of them in common, at a terminal point, the one owning the track is responsible for the consequences of its negligence in failing to render harmless to the employees of the other company a low bridge spanning the track, if the duty of taking proper precautions for that purpose was upon it and it alone. The mother of an employee of the other company, if otherwise in a situation to sue, may recover for the homicide of her son, caused by such negligence. In such case, though it be not alleged that the company not owning the track (that is, the master of the employee) was ignorant of the danger or of the conditions which caused it, it will not be assumed in deciding upon a demurrer to the declaration that it was negligent in running the train to which the employee was attached when injured; consequently, the question whether any negligence of that company could be imputed to the employee so as to render him chargeable with contributory negligence is not now for decision."

Judgment reversed; on cross-bill of exceptions, affirmed. BLECKLEY, J., discussed the case and points at length, the decision being stated sufficiently in the official syllabus. At the end of the opinion there is a note covering authorities other than those cited in the opinion on points of pleading and practice.

**MINOR EMPLOYEE KILLED BY BEING THROWN FROM TENDER OF ENGINE.** — In **EAST TENNESSEE, VIRGINIA & GEORGIA R. R. CO. v. MALOY**, 77 Ga. 237 (1887), minor employee killed by being thrown from back of tender of engine and run over by train, the deceased having obeyed directions of the engineer to pull back the reverse-lever of the engine, which flew back and gave the train a jerk, causing the injury complained of, judgment for plaintiff, the mother of the deceased, on verdict rendered in the Dodge Superior Court was *reversed*, on the grounds stated in the official syllabus to the report as follows: " 1. Where suit was brought against a railroad company by the parent of a minor son, to recover for the homicide of the minor, caused by such company, it was error to permit a witness to testify that the conductor of the train, who was on the engine at the time of the accident, told the witness shortly thereafter, in answer to a question as to how it happened, that, the engineer told him that he had pulled back the reverse-lever of the engine and it flew back, giving the train a jerk, which threw the son of the plaintiff from the back

of the tender and the cars ran over him. Such testimony was mere hearsay and inadmissible.

" 2. Testimony that the plaintiff's son, prior to his death, made a certain statement as to how the injury was done, was inadmissible, such a statement not being made at or near the time of the accident so as to be admissible as part of the *res gestae*. Dying declarations are not admissible in civil cases.

" 3. Where a husband and wife were living separately, and the wife was using the wages of her minor son for the support of herself and her minor children, a suit for his homicide, brought by her in her own name and in the name of her husband for her use, could be maintained; and a charge to that effect was not error.

" 4. Railroad companies are not liable to employees as they are to passengers, but in an action by an employee against a railroad company for an injury to him, or by one who sues for his homicide, it must be shown either that such employee, at the time the injury was received, was free from fault, or that the company was at fault, before any presumption of negligence would arise against the defendant. If either one of these things were shown, the other could be presumed, and the *onus* would be upon the company to rebut that presumption; but the rule as to passengers is different.

" 5. In a suit brought for the killing of an employee by a railroad company, it was error to charge as follows: 'A railroad company shall be liable for any damage done to persons, stock or other property by the running of the locomotive or cars or other machinery of such companies, or for damage done by any person in the employment and service of such companies, unless it shall appear from the evidence that their agents have exercised all necessary and reasonable care and diligence, the presumption in all cases being against the company, with the following modifications, that where the party injured was in a position to control the movements of the train, such as an engineer was, or a conductor injured in the running of the train, that the presumption of negligence did not arise against the company; but this modification did not apply to one who was engaged to sweep out the train, or like employees, such as firemen.'

" 6. The doctrine of contributory negligence does not apply to the case of an injury sustained by an employee, so as to permit him to recover, but to diminish the amount of the recovery in proportion to the fault attributed to him. In order to recover, he must be free from fault; and if the injury is sustained by him in consequence of any fault or negligence on his part, he cannot recover. And where a suit was brought by the parent of a minor employee to recover for the killing of her son, the parent could not recover unless he could have done so if he were in life."

**Notes of cases relating to injuries to minor employees in service of railroad companies.***Minor employee injured coupling cars.*

In *THE CENTRAL RAILROAD v. HARRISON*, 73 Ga. 744 (September Term, 1884), minor employee injured while coupling cars, judgment for plaintiff for \$500 was affirmed, the official syllabus stating the decision as follows: "Where the rule of a railroad company provided that, while a coupler was between the cars, the train should not be put in motion, a coupler so engaged had the right to presume that it would not be moved, and that he could pass between the projecting beams of the cars, which he could have done if the train had not been moved; and if, while so passing out, under a signal given by another servant of the company, the engineer backed the train, and the coupler was caught between the projecting beams and crushed to death, if he was a minor, his father could recover for the loss of his services and a recovery would not be prevented by the fact that the deceased might have passed under the beams in safety by stooping."

*Minor employee, a brakeman, striking against object and falling from car.*

In *WOLFE v. EAST TENNESSEE, VIRGINIA & GEORGIA R'Y CO.*, 88 Ga. 210 (December, 1891), two actions, one by plaintiff, a minor, a brakeman in defendant's service who was injured while on side of car, striking against something, falling and being run over, his leg and arm being injured, and the other by the father of plaintiff for loss of son's service, judgment of nonsuit in the Gordon Superior Court was affirmed. The official syllabus states the decision as follows:

"1. The evidence showing clearly that one of the plaintiffs, an employee, was not free from fault, and there being no evidence that the structure which caused the injury was located so as to be dangerous to employees when engaged in the line of their duties, the nonsuit as to him was properly granted.

"2. For the same reasons, the nonsuit was properly granted as to the action in favor of the employee's father, his implicit consent to the employment of his minor son by the railroad company being fairly deducible from the facts in evidence, and there being no proper foundation for an inference to the contrary."

*Minor employee, a brakeman, injured on train.*

In *HUNNICKUTT v. GEORGIA PACIFIC R'Y CO.*, 85 Ga. 195 (April, 1890), it was held that: "Whether after notice from a parent to a railroad company not to employ her minor son, but it does so and the minor is injured while in such employment, the company can plead his negligence in its defense to an action for the injury brought by the parent, becomes immaterial if the parent alleges that the minor was injured through no fault of his own and the cause be tried upon this issue mainly." Plaintiff's son was sixteen years of age, and while acting as brakeman and general train-hand on one of the defendant's trains was injured in his left hand and fingers. Judgment for defendant in the City Court of Atlanta affirmed.

*Boy, assisting employee, not a fellow-servant, but a volunteer.*

In *RHODES v. GEORGIA R. R. & BANKING CO.*, 84 Ga. 320 (January, 1890), it was held that: "Whether a boy of thirteen years, who assumed to assist the servants of a railroad company, at their request, in moving a loaded car, without the knowledge, consent or authority of the company, and while thus employed

was injured so that he died, could be held responsible for his acts and conduct, is for determination by the jury upon the proof as to his knowledge of the distinction between good and evil and his capacity to comprehend and avoid the danger to which he was exposed. Sufficiency of such knowledge and capacity would prevent a recovery for the homicide; otherwise there might be a recovery should the jury believe the company was negligent. The boy was a volunteer, and not a fellow-servant." Judgment sustaining demurrer to the declaration reversed.

*Minor employee injured — Defective machinery — Question for jury.*

In *WOODRUFF* (by next friend) *v. ALABAMA GREAT SOUTHERN R. R. Co.*, and *WOODRUFF v. SAME*, 75 Ga. 47 (1885), two actions for injuries to brakeman, one by the injured party, a minor, and the other by the plaintiff's father, both cases being tried together, it was held that "where an employee of a foreign railroad brought suit in this State on account of an injury received in the State where the railroad was chartered, although the evidence may have made a very weak case, yet there was possibly enough evidence, if uncontradicted, to enable the jury to say that the injury was occasioned by the defective machinery of the company, and where the law which should determine the plaintiff's right was somewhat uncertain, and it was doubtful whether, under the common law, which was of force in the State where the casualty occurred, he sustained the relation of co-employee to the company's agent, whose negligence caused the damage, the case should have been allowed to go to the jury, and the nonsuit was error."

*Minor employee, a fireman, injured — Assumption of risk — Parent and child.*

In *SHIELDS v. YONGE* (Superintendent of the Western & Atlantic Railroad), 15 Ga. 349 (1854), the rule laid down in the English Exchequer of Pleas, in *Hutchinson v. Railway Co.*, 5 Exch. 351, which is also to the same effect in *Priestley v. Fowler*, 3 M. & W. 1, was adopted, namely, "that a servant, when he engages to serve a master, undertakes, as between him and his master, to run all the ordinary risks of the service, and this includes the risk of negligence on the part of a fellow-servant, whenever he is acting in discharge of his duty, as servant of him who is the common master of both." This principle was also recognized in *Scudder v. Woodbridge*, 1 Kelly, 198 (Ga.). It appeared in the Shields case that plaintiff's minor son, who was alleged to be employed on the train as a fireman by contract with the father (the plaintiff), was fatally injured through the alleged carelessness of defendant's employees. Plaintiff was nonsuited in the Whitfield Superior Court, but on appeal, the judgment was *reversed* for error in sustaining demurrer to first count of complaint.

## CENTRAL RAILROAD & BANKING COMPANY V. KENNEY.

*Supreme Court, Georgia, January Term, 1877.*

[Reported in 58 Ga. 485.]

### SECTION-BOSS INJURED BY HAND CAR WHICH RAN OFF TRACK

— DEFECTIVE APPLIANCE — INSPECTION.— 1. To make a *prima facie* case for recovery, a railroad employee suing the company for a physical injury resulting from an act in which he participated, must prove, either that he was not to blame, or that the company was. The latter, in reply, may defend successfully by disproving either proposition; that is, by showing that the plaintiff was to blame, or that the company was not. If both were to blame, or if either was, the plaintiff cannot recover.

2. A section-master in temporary charge of a hand car must note such defects in it as are discoverable in the reasonable and ordinary exercise of diligence in the course of his duty, and decline or cease to use it if it be obviously unsafe; otherwise, he cannot recover for an injury to himself which his declaration alleges to have been caused, in part, by the defective character or condition of the car.
3. If the defect in the car was such as to deceive human judgment, the company, as well as the plaintiff stands excused. And whatever diligence he exercised in seeing to the apparent safety of the vehicle, goes to the credit of his employer, as well as to his own credit.
4. Where negligence is in issue a new trial may be granted for insufficient evidence, or because the verdict is contrary to evidence, as may be done in other cases where questions of fact are involved.

(Syllabus by the Court.)

APPEAL from judgment for plaintiff for \$3,500 in the Henry Superior Court. *Judgment reversed* (1).

Kenney brought case against the Central Railroad and Banking Company for \$20,000 damages. His declaration alleged substantially as follows: On February 25, 1875, plaintiff was in

1. On a subsequent trial of the KENNEY case in the Henry Superior Court there was a verdict and judgment for the plaintiff for \$2,500, which, however, was reversed on appeal to the Supreme Court (September Term, 1879), the court (per WARNER, Ch. J.) holding that "neither the amendment to the plaintiff's declaration nor the evidence offered in support thereof takes it without the ruling when it was here before [58 Ga. 485], and consequently the judgment refusing a new trial must be reversed." BLECKLEY, J., concurred; JACKSON, J., dissented. See CENTRAL R. R. v. KENNEY, 64 Ga. 100 (1879). There seems to have been another appeal in the KENNEY case, by plaintiff from judgment for defendant in the Clayton Superior Court. See KENNEY v. CENTRAL RAILROAD, 61 Ga. 590 (1878). BLECKLEY, J., said: "After our careful

the employ of the defendant in the capacity of overseer of the East Point section, No. 12, Atlanta Division of the defendant's road. In the discharge of his duties, and under the direction of the defendant, he was running on what is known as the supervisor's crank-car, over defendant's track, at Hampton. Without carelessness or negligence on his part, but owing to the defective and careless construction by defendant of the "frog" at that point, and owing also to the defective construction of the wheels of the said crank-car, the same not being securely and properly fastened at the axle, but loosely and carelessly attached, the said car ran off the track in passing over said "frog," precipitated plaintiff on the track, ran against him and broke his right leg, permanently injuring him, etc. The defendant pleaded the general issue.

The evidence for the plaintiff presented, in substance, the following facts: The plaintiff, under the direction of the supervisor, had been engaged in measuring wood and cross-ties along the line of the railroad. The supervisor had furnished to plaintiff his crank-car for use in discharging this duty. He met J. T. Dorsey, also a section-master, at Lovejoy's station, who stated to him that the supervisor directed that he (Dorsey) should accompany him over his (plaintiff's) section. Dorsey, two negroes and plaintiff, then went on the same crank-car in the direction of Hampton. When two or three miles from the last-named station, plaintiff ordered the car to be stopped and taken off the track, in order to allow a train to pass. Plaintiff observed one of the hands working on the wheels of the car. He stopped him and examined it. He ascertained that the wheel was not properly put on. He and Dorsey put on the wheel and drove in the wedge. Plaintiff then considered it safe as it ever was. After the train passed, the car was replaced on the track, and

ruling in the Central R. R. & Banking Co. v. Kenney, 58 Ga. 485, we need not discuss such a case as the present, which involves the legal principles similar to those which were decided in that case, and, in its main features, is controlled by that authority. The commander of a hand car ought to see to it that the employees under his orders do their duty. If they cannot safely work with coats on, he should require them to take their coats off. If they move the car at too high a speed, he should interpose promptly, and prevent it. If the car is not in a condition to be run safely, he should not have it run at all. He stands to the company in a relation of trust, and should be faithful to its interests as well as his own safety. A most important part of his duty is to supervise the employees who are placed under him. Judgment affirmed."

propelled towards Hampton. As they approached this station, they were going down grade at the rate of about six miles an hour. When they struck the "frog" at Hampton, the car was thrown from the track and the plaintiff was injured. The wheels of the car were fastened on with wedges. The flanges to the wheels were not more than one-half inch deep. Plaintiff's opinion was that the accident was caused by the flanges of the wheels being too shallow. The speed at which the car was running was usual. Plaintiff was in no hurry. He had been employed on defendant's road as a section-master for about two years. He had been in the employ of the Southwestern Railroad Company, in the same capacity, for about the same time. He had thus been in the daily use of hand-cars. He had complete control of the car; he stopped it and put it on at his pleasure. There was also evidence to show the nature and extent of plaintiff's damages, etc.

The defendant introduced evidence to show that the car, at the time of the accident, was running at a greater speed than six miles per hour, and that it was considered dangerous by experienced railroad men to go over a "frog" in a hand-car at a greater rate of speed than from two to three miles miles per hour. The jury found for plaintiff for \$3,500.

The defendant moved for a new trial on the following grounds: 1. Because the verdict was contrary to the following portion of the charge of the court: "If the plaintiff was at fault or was negligent, then he cannot recover, although the car, or track, or both, were defective. If there was a defect in the wheel on the car, and the plaintiff was apprised of it, it was his duty, if he had to use the car, to exercise care and caution in running the car; and in order to determine whether he used care and caution, you will look to the evidence in the case. You will look to the distance he was required to travel on that day; the amount of work he was required to do; the extent of the defect in the wheel; the effort, if any, to repair the defect in the wheel; the character of the wheel after it was repaired — that is, whether it was safe or not to go on with it in its condition; the speed he was running; the character of the track over which he was running; and to all the facts and circumstances of the case. If, in your opinion, he acted as a prudent, cautious man would have done under similar circumstances, then he could not be charged with being at fault, or being negligent. But if, in your opinion,

he did not act as a prudent man should have acted under similar circumstances, then he was at fault, or negligent. If plaintiff was injured by the running off of the car of defendant for any cause, he is entitled to recover for the injuries received, unless he was at fault, or was negligent; but if he was at fault, or was negligent, then he is not entitled to recover." 2. Because the verdict is contrary to the law and the evidence. The motion was overruled and defendant excepted.

A. R. LAWTON and SPEER & STEWART, for plaintiff in error.

L. J. GARTRELL and J. J. FLOYD, for defendant in error.

**Bleckley, J.** — 1. Let the word blame, as here used, be understood to mean negligence or the omission of that degree of diligence to which the party is legally bound. Where a railroad employee has been physically injured while on duty, he cannot recover of the company if both were to blame, or if neither was to blame, or if he was to blame and the company not; only where he was not to blame and the company was, is he entitled to recover. Of course, the blame of a co-employee, or of any officer or agent, is treated as that of the company itself. Concerning one class of cases, namely, that class in which, as in the instance before us, the injured party shared directly in the act which resulted in his own wounding, the rule as to the burden of proof is as follows: After proving the fact and degree of the injury, if the plaintiff will show himself not to blame, the law then presumes, until the contrary appears, that the company was to blame; or if he will show, on the other hand, that the company was to blame, the law then presumes, until the contrary appears, that he was not to blame. So that in order to make out a *prima facie* case, and change the *onus*, he must not go further than to show by evidence one or the other of these two propositions; either that he was not to blame, or that the company was. The company, taking at this stage the burden of reply, can defend successfully by disproving either proposition. The disproof of both is not necessary; but until one or the other shall be overcome, the defense is not complete. 56 Ga. 586. It follows that where an employee of a railroad company sues for a personal injury sustained by him in consequence of a hand-car leaving the track, upon which he was riding, and the running of which he controlled, he must, in order to entitle himself to recover, show affirmatively that he was free from fault, or that there was negligence by the company sufficient to have caused the run-off. It takes this

much to make a *prima facie* case; after which, the plaintiff will still fail, if it appears, from all the evidence taken together, either that he was not free from fault or that the company was not negligent.

2. The person injured being a "section-master" (a position requiring the daily use of a hand-car), and having some years' experience in his business, and the declaration alleging that the injury was caused, in part, by a defective hand-car, which car, according to the evidence, was, at the time, in use by him and under his control, he cannot recover without making it appear that he did not discover the defect in time to avoid exposing himself to the danger, or that the defect was of such a nature as not to be discoverable in the reasonable and ordinary exercise of diligence in the course of his duty. *Johnson v. Western & Atl. R. Co.*, 55 Ga. 133; *Western & Atl. R. Co. v. Adams*, 55 Ga. 279.

3. Under the evidence, if the run-off was occasioned by the shortness of the flange on the wheels of the car, there is no suggestion that this defect was less known to the plaintiff before the calamity than after; or if it was due to displacement of one of the wheels, a like displacement of the same wheel had occurred previously, on the same day, which the plaintiff had corrected to his own satisfaction. The true condition of the defective wheel at the time of the disaster was better known to him than to the company. If it appeared to him safe, no reason is suggested why the company could have known or suspected it to be unsafe. If the defect was such as to deceive human judgment, the company, as well as himself, stands excused for not discontinuing the use of the car on account of it. Whatever diligence he exercised in seeing to the apparent safety of the vehicle, goes to the credit of the company as well as to his own credit. When, with so much experience, and with such opportunities for forming an opinion, he pronounced it safe, he was acting for and representing the company. His mistake, if without good excuse, might render the company liable to others, had others been injured; but, of course, it should not make the company liable to him.

4. While negligence is a question of fact for the jury, it, like all other questions of fact, is subject to be examined by the court on a motion for new trial; and where the verdict is contrary to evidence, or without sufficient evidence to support it, a new trial will generally be granted.

Judgment reversed.

SECTION BOSS KILLED BY TRAIN — VERDICT CONTRARY TO EVIDENCE.—In EAST TENNESSEE, VIRGINIA & GEORGIA R'Y CO. v. HARBUCK, 91 Ga. 598 (April, 1893), section boss inspecting track struck and killed by train, judgment for plaintiff in the City Court of Atlanta was *reversed*. Harbuck was a section boss on the Georgia Pacific Railway, the track of which was used by defendant's trains. He was walking about the middle of the track, inspecting the same, when he was struck from behind by defendant's passenger train, running about thirty miles an hour and on schedule time. The point where the casualty occurred was about two miles beyond the city limits of Atlanta, near a private crossing over the railroad. At this point the Western and Atlantic Railroad ran parallel to the Georgia Pacific, and freight trains were passing on the former. The alleged acts of negligence of defendant's servants were, in blowing no whistle and giving no warning of the approach of the train, in running at an unusual and unlawful speed, in not checking the speed and endeavoring not to strike Harbuck when he was evidently unaware of its approach, and in not keeping proper lookout to see if any one was on the track. It appeared that the train was between 200 and 300 yards from Harbuck and the men accompanying him when it came in sight, having just rounded a curve. The official headnote states the ruling as follows:

"1. According to the evidence of those witnesses who must have been best acquainted with the actual facts, the railroad company made it appear that its agents exercised all ordinary and reasonable care and diligence, and that the killing of plaintiff's husband took place in spite of such observance. The acts of diligence comprehended blowing the whistle, sounding the alarm, applying brakes, and, so soon as it was discovered, that the signals given were not having their natural and ordinary effect, making an effort to stop the train. Any and all material conflict with adverse witnesses may be reconciled upon the theory that the plaintiff's witnesses erroneously attributed all the whistling which they heard to the locomotives which happened to be near by upon the track of the Western and Atlantic Railroad. These witnesses could have been mistaken in thinking that the whistles which they heard all came from locomotives on the latter road, but the defendant's witnesses could not possibly have been mistaken in this respect. They knew whether sounds were made by the locomotive of the train of the East Tennessee, Virginia and Georgia Railway on which they were traveling; and, consequently, without unnecessarily imputing perjury to them, their testimony on the subject could not be disbelieved. The

number of witnesses who coincided substantially in their testimony on this material point, would forbid the adoption of any reasonable theory of collusion by which to account for their evidence; and without either ignorance or collusion on their part, the facts must have been in accordance with their testimony.

"2. The verdict was contrary to the evidence, and the court erred in refusing to grant a new trial.'

**SECTION BOSS JUMPING FROM HAND-CAR TO AVOID COLLISION — NONSUIT REVERSED.** — In **SMITH v. WRIGHTSVILLE & TENNILLE R. R. CO.**, 83 Ga. 671 (1889), plaintiff, a section boss, in employ of defendant, injured by jumping from hand-car in attempt to avoid impending collision with an approaching "wild" locomotive, judgment of nonsuit in the Johnson Superior Court was *reversed*, the first paragraph of the official syllabus to the report, stating the case as follows: "Where an employee of a railway, while engaged in the performance of duty in running a hand-car, was put in sudden apprehension of a dangerous collision with a locomotive approaching from the opposite direction, and the threatened collision was due alone to the negligence of the company, whether it was rash or reckless to leap from the car, or whether he should have remained upon it, or left it by means less hazardous than jumping, are questions not clear enough under the facts of the case to justify the granting of a nonsuit. The allowance rightfully to be made for indiscreet conduct under excitement and alarm can better be determined by a jury than by the court."

## THE GEORGIA RAILROAD & BANKING COMPANY v. NELMS.

*Supreme Court, Georgia, March Term, 1889.*

[Reported in 83 Ga. 70.]

**TRACK-HAND INJURED BY DEFECTIVE APPLIANCE — HAMMER NOT MACHINERY — STATUTE — WORDS AND PHRASES.** — The plaintiff having been employed by the railroad company to work in the construction of its track, and having sustained injuries by the breaking of a hammer in his hands furnished him by the company, and not having been injured by the running of the cars or machinery or by any other employee of the company, there was no presumption in his favor against the company under § 3033 of the code; but his case falls under the general law of master

and servant, under which the burden was upon him to show negligence on the part of the company in furnishing him with a defective hammer.

- (a.) The mere fact that this and other hammers were defective, and that the injury resulted therefrom, is not sufficient to authorize an inference of negligence on the part of the company in their purchase and selection.
- (b.) A hammer thus used is not included in the term "machinery" as used in § 3033 of the code.
- (c.) The verdict was contrary to law and evidence.

(*Syllabus by the Court.*)

APPEAL from judgment for plaintiff in the Rockdale Superior Court. *Judgment reversed.*

J. B. CUMMING, A. C. MCCALLA and BRYAN CUMMING, for plaintiff in error.

J. N. GLENN and A. M. SPEER, for defendant in error.

**Simmons, J.** — Nelms brought his action against the Georgia Railroad and Banking Company for damages, in which he alleged, in substance, that he was employed by said company to assist it in changing the gauge of its track, and that the company furnished him and other employees with certain tools and implements with which to take up the iron rails and re-fasten them to the cross-ties; that hammers of certain shapes, weights, purity of steel and the proper temper were required in order that such work should be done with safety and dispatch; that the petitioner was furnished with a hammer to drive spikes; that he believed he had been furnished with one of the proper temper, etc., and that knowing nothing to the contrary, he entered upon such work under the direction and control of said company's officers; and while so engaged in drawing spikes for said company, he was hurt, wounded and maimed by the breaking of the hammer so furnished him, said breaking causing pieces thereof to fly off with great force and violence, a piece striking the knee-joint of the petitioner, which penetrated and entered said knee-joint, causing great pain, suffering, etc., and permanently injuring said knee; and a piece also striking him near the eye, embedding itself deep in the flesh near the eye-ball, which also gave him great pain and uneasiness, and endangered the loss of the sight of said eye. By reason whereof he was damaged, etc.

On the trial of the case the jury returned a verdict of \$2,000; a motion was made for a new trial, which was overruled, and the defendant excepted.

The only ground of the motion for a new trial which it is necessary to notice is, the ground that the verdict was contrary

to law and to the evidence. The evidence as shown in the record is, in substance, as follows:

That the plaintiff was employed by the company to assist in changing the gauge of the railroad; that he worked under Brooks, who was the boss of the hands; that Brooks put him to work with a hammer to drive spikes, directing him to drive up the spikes where they were bent under the iron, and that he instructed him where he found a spike that was not down and was bent, to turn the small face of the hammer down, and put it on the head of the spike and drive it up. Thus the hand with whom he was working driving spikes used his hammer as a punch, putting its small face on the head of the spike, while the plaintiff with his hammer struck the upturned large face of the hammer which was held on the spike, and the spike was in this way driven up. In doing this a piece of his hammer burst off, a part of it striking him on the knee, and another piece on the right eye. All the other hands used their hammers in the same way. He was hurt about nine o'clock in the morning, having commenced work about five o'clock. Other hammers broke besides his, but he did not know whether any broke before he was hurt or not; his hammer was a new one, and some of the others might have had old ones; he had never seen any hammers break before that time; he had worked on other railroads before, and had done this kind of work; he did not examine the hammer "any more than just going to take up a tool to work with;" he did not see anything the matter with it.

Two of the railroad hands who were at work on the same day, and at the same place with the plaintiff, testified for him. One of them testified as to the pieces flying off of the hammer; he said they "got to flying like thunder;" "they were flying with force; they could hear them whistling;" that Brooks told them to "work up;" most of the hammers burst, their faces split or shelled off; some of them were old and some of them new hammers; nearly all of them broke; they battered on them a "right smart while" before they commenced bursting, the hammers looked to be all right when they picked them up, and looked to be first class hammers, and "they" said they were first class. The other witness testified as to several of the hammers breaking. He said he thought his was the first to break; that he could not hit the spikes with his hammer, and he got a new hammer out of the car which did not break; that he paid no attention to the

hammers to see whether they were breaking or not; that if two pieces of the steel struck together, and they were very hard, they were likely to break.

This case seems to have been tried under section 3033 of the Code, which declares, that "a railroad company shall be liable for any damage done to persons, stock or other property, by the running of locomotives or cars or other machinery of such company, or for damage done by any person in the employment and service of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company." The judge charged the jury, in substance, that when the injury was shown, the presumption was against the railroad. The declaration alleges, and the evidence shows, that the injury sustained was caused by the breaking of a hammer in the hands of the plaintiff. We do not think that a hammer thus used comes under the term "machinery" used in the above section. The Supreme Court of Alabama, in the case of Ga. Pac. Ry. Co. v. Brooks, 4 South. Rep. 289 (84 Ala. 138; 13 Am. Neg. Cas. 132), in discussing the statute of that State somewhat similar to our statute, says: "A hammer is a tool or instrument ordinarily used by one man in the performance of manual labor. It may be made an essential part of machinery when it is intended to be and is operated by means thereof; but when disconnected from any other mechanical appliances, and operated singly by muscular strength directly applied, such tool or instrument is not machinery in its most comprehensive signification, or within the meaning of the statute." The plaintiff not being injured in any of the ways pointed out in the above section, either by the running of the cars or machinery, or by any other employee of the company, there was no presumption in his favor or against the railroad company, as set forth in the above section. This case, therefore, is not governed by that section, but falls under the general law of master and servant. Under that law, the burden was upon the plaintiff to show negligence on the part of the defendant in supplying him with a defective hammer. Before he can recover, under the facts disclosed by this record, he must show that the hammer was defective, and that the company knew it or could have ascertained it by the exercise of ordinary care and diligence. The mere fact that the hammer was defective, and that other hammers were defective, and that the injury

resulted therefrom, is not sufficient to authorize the jury to infer negligence on the part of the company in the purchase or selection of these hammers.

Wood, in his "Law of Master and Servant," § 368, says: "From the mere fact that the injury results to a servant from a latent defect in machinery or appliances of the business, no presumption of negligence on the master's part is raised. There must be evidence of negligence connecting him with the injury. The fact that machinery has been previously protected, or that subsequent to the injury guards were provided for it, is not evidence from which negligence may be inferred. The mere fact that the machinery proves defective, and that an injury results therefrom, does not fix the master's liability. *Prima facie* it is presumed that the master has discharged his duty to the servant, and that he was not at fault. Therefore the servant must overcome this presumption by proof of fault on the master's part, either by showing that he knew or ought to have known of the defects," etc. "The burden of proving negligence upon the part of the master is upon the servant, and he is bound to show that the injury arose from defects known to the master, or which he would have known by the exercise of ordinary care, or that he has failed to observe precautions essential to the protection of the servants which ordinary prudence would have suggested."

The same work, § 382, says: "The servant seeking to recover for an injury, takes the burden upon himself of establishing negligence on the part of the master, and due care on his own part. And he is met by two presumptions, both of which he must overcome in order to entitle him to a recovery. First, that the master has discharged his duty to him by providing suitable instrumentalities for the business, and in keeping them in condition, and this involves proof of something more than the mere fact that the injury resulted from a defect in the machinery. It imposes upon him the burden of showing that the master had notice of the defect, or that in the exercise of that ordinary care which he is bound to observe, he would have known of it. When this is established, he is met by another presumption, the force of which must be overcome by him, and that is, that he assumes all the usual and ordinary hazards of the business."

Mr. Thompson, in his work on Negligence, p. 1053, § 48, uses the following language: "In an action by an employee against his employer, for injuries sustained by the former in the course

of his employment, from defective appliances, the presumption is that the appliances were not defective; and when it is shown that they were, then there is a further presumption that the employer had no notice or knowledge of this fact, and was not negligently ignorant of it." See also *Pierce on Railroads* 382.

Applying these rules to the evidence, we do not think that the plaintiff was entitled to recover. There was no evidence in the record going to show any negligence whatever on the part of the company or its officers, unless it could be inferred from the fact that other hammers broke the same day; and as we have seen from the above extracts, that it is not sufficient proof of negligence. On the contrary, there is evidence to show that, as far as could be ascertained from an examination of the hammers, they are first class. Other witnesses said that they looked as if they were first class, and that "they" (meaning, we suppose, the officers of the company) said they were first class. We cannot hold — for in our opinion it is not the law — that an employer is liable to his servant when he furnishes him with an axe, a wagon, a saw, a hammer or any other tool which appears to be first class, and which subsequently, by some latent defect, breaks and injures the servant. If such were the law, every farmer, contractor or other employer would be liable to his employee when he furnished him tools and they broke and injured him on account of some latent defect which could not be ascertained by the exercise of ordinary care.

For these reasons we hold that this verdict was contrary to law and to the evidence, and that the trial judge erred in refusing to grant a new trial upon this ground. See also *Reid v. C. R. R. Co.*, 81 Ga. 694. Judgment reversed.

**TRACK-HAND KILLED BY TRAIN — DECLARATION — PLEADING AND PROOF.** — In **THE CENTRAL RAILROAD COMPANY v. HUBBARD**, 86 Ga. 623 (*February, 1891*), track-hand killed by an engine, judgment for plaintiff was *reversed*, the official syllabus stating the decision as follows:

"1. A declaration alleging that the plaintiff's husband, an employee of a railroad company, was killed by an engine of the company, setting forth such a statement of the facts and circumstances connected with the killing as did not of themselves negative the existence of negligence on the part of the company, and distinctly averring that the deceased was without fault, and that

the killing was caused by the negligence of the company's servants in the running of such engine, was not demurrable.

" 2. Whether or not the presumption of negligence, which § 3033 of the code provides shall in all cases be against a railroad company, has been removed, is a question of fact for the jury, and not one of law to be determined by the court.

" 3. In a suit against a railroad company by a widow for the killing of her husband, who was an employee of the company, a request to charge, grouping together certain alleged facts tending to show negligence on the part of the deceased, and instructing the jury that if these facts be true the plaintiff cannot recover, without leaving the jury to determine whether such facts did or did not constitute negligence on his part, was properly refused.

" 4. When the plaintiff's declaration alleges that her husband was killed in a special way by the negligent running of a particular train or engine of a railroad company, and the proof shows that he was killed by another engine of the company, and in a manner different from that alleged, and the evidence is such that, in any view of the case, the plaintiff's right to recover is very doubtful, a verdict in her favor should be set aside."

TRACK-HAND INJURED BY IRON RAIL FALLING FROM HAND CAR WHICH WAS BEING UNLOADED.—In JOHN-SON v. WESTERN & ATLANTIC R. R. CO., 55 Ga. 133 (1875), judgment granting motion for new trial after verdict rendered for plaintiff in the Gordon Superior Court for \$2,000, was *affirmed* by the Supreme Court, it being held that where an employee of a railroad company knowingly uses defective machinery he cannot recover damages for injuries resulting therefrom. In the opinion rendered by WARNER, Ch. J., is the following statement of the facts: "It appears from the evidence in the record that the plaintiff was in the employ of the defendant as a track-hand upon its road; that he, with other employees of the defendant, at the time of the alleged injury, were engaged in the transportation of themselves and tools to their place of work, on a hand car. When going along to their place of work on defendant's road, the boss of the squad directed them to stop and take on the car three iron rails and five cross-ties, which was done, placing two of the rails on the west side of the car and one on the east side thereof; the cross-ties were put across the rails, the car then went forward about one-fourth of a mile, and took on another iron rail, which was placed on the east side of the car, near the edge, which was worn off and beveled. The parties then started off down the

road, went about half a mile, when they reached Reeve's crossing; the boss blew his whistle for the car to stop, and said, 'let us get this car off the track, the train will soon be passing,' Whilst unloading the car to get it off the track, the iron rail which had been placed on the east side of the car rolled off and broke the plaintiff's leg." Plaintiff testified as to the defective condition of the car, the time he had been at work with the same car, and his knowledge of the state of the car. Defendant requested an instruction to the effect that if plaintiff had knowledge of the defect but continued to work, he was not entitled to recover, which request was refused. The Supreme Court held that such refusal to instruct was error, but inasmuch as the trial court corrected its own error by granting a new trial, the judgment of that court was affirmed.

FREIGHT CAR INSPECTOR KILLED ON TRACK — DAMAGES — DEATH — STATUTE — INSTRUCTION — ANNUITY TABLES — EVIDENCE — VERDICT. — In **THE GEORGIA RAILROAD v. PITTMAN**, 73 Ga. 325 (*September Term, 1884*), appeal by defendant from judgment for plaintiff for \$5,500 rendered in the City Court of Atlanta, judgment for plaintiff was *affirmed*. The statement of facts and the points decided are as follows:

Mrs. Nancy E. Pittman brought case against the Georgia Railroad to recover for the homicide of her husband. On the trial, the evidence on behalf of the plaintiff was, in brief, as follows: Pittman, the deceased, was employed by the Western and Atlantic Railroad, and his business was to look after freight delivered to the Georgia Railroad, and to take down a memorandum of the numbers and seals of the cars. He was generally a sober, industrious man, earning a salary of \$60 per month, and was frequently engaged in trading, so that his income was about \$1,200 per annum. He was economical, and his own support did not cost more than \$200 or \$250 a year. He was forty-four years old at the date of his death. The numbers were somewhat high on the sides of the cars, and the ground was slightly depressed between the tracks, there being several tracks running about that point. It was common to step back on another track, if vacant, get the numbers of the cars, and then go up and examine the seals. While doing this, deceased was run over by defendant's train, and died from the effects. The tracks at that point were about four or five feet apart. One witness testified that he never knew the deceased to be drunk, and only one time in twenty-five years to have the appearance of drinking. Two others swore that he did not show signs of being under the influence of liquor shortly before and at the time of the injury; and one stated

that after the injury the doctor who was summoned furnished some whisky, and recommended that he drink it, but he refused it. Other trains were moving about in the railroad yard that day and every day, but not just at that time and place. One engine was not far away. The engineer testified that there were cars between him and the place of the injury, and that he did not remember hearing the engine-bell ring, but heard hallooing after the injury, and saw the crowd running down the track. Tables of life expectancy were introduced.

The evidence for the defendant was, in brief, as follows: The engine which caused the injury was engaged in shifting cars. It went up one track and came backing down another at a speed of about two and one-half or three miles an hour. When it had gone about fifteen or twenty feet, the fireman looked over the tender and saw Pittman making entries in his book and standing on the track with his back partly turned towards the engine, at a distance of about two and a half car lengths (a car length being about thirty or thirty-three feet). The fireman shouted, "Look out!" two or three times, and seeing that it did not seem to draw Pittman's attention, stepped back and pulled the bell-rope, ringing the bell. He then went to the other side of the engine to see if Pittman had left the track, and not seeing him, returned to his position and found that he had been hurt. The engineer did not slacken the speed of the engine when the fireman hallooed and rang the bell, but any one would have had time to leave the track after the bell rang, if he had paid attention to it. There were steam-brakes on the engine, by which it could have been stopped in five or six feet at the speed at which it was running. There was a conductor whose duty it was to make up the train. He was not with the engine at the time of the injury, but gave instructions to the train-hand, as was very often done. One witness for the defendant testified that he was engaged on behalf of the Georgia Railroad in the same position as Pittman occupied with the Western and Atlantic Railroad, and was at work along with him just before the accident; that Pittman was so drunk that he could not walk along a broad plank without staggering from side to side, that he urged Pittman to come out from between the tracks, told him that the engine was standing very near, and that they were pulling backwards and forwards all the time, and that the witness thought he had better step out on the other side until the engine got out, and then come back and get the seals on that side; that Pittman continued to take down the numbers of the cars; that the witness was afraid the engine was going to "pull down," told Pittman that he had better get out, and

took hold of his arm to urge him out; that Pittman pulled away, saying, "I can take care of myself;" that the witness said, "I am going out, and you can go if you like," and walked around the car, thinking Pittman was behind him; that he heard the bell ring, looked and did not see Pittman, heard some one hallooing, and found that Pittman was hurt.

The jury found for the plaintiff \$5,500. The defendant moved for a new trial on seventeen grounds, the substance of which are stated in the decision, in the divisions where they are discussed. The motion was overruled, and defendant excepted. [JOSEPH B. CUMMING and HILLVER & BRO., appeared for plaintiff in error; HOPKINS & GLENN, for defendant in error.]

The opinion was rendered by JACKSON, Ch. J., and the points decided are stated in the official syllabus as follows:

"1. Whether a person's capacity to earn money and labor successfully would be diminished from old age, and how much such diminution would be, depends considerably upon the character of the labor and the expectation of life of the person, and this question was fairly submitted by the court to the jury.

"(a.) The act of 1878, allowing the wife to recover the full value of her husband's life in case of his homicide, is not unconstitutional or invalid; and in construing it, the judge gave the full measure of its rights to the defendant below in having the husband's support, while living, deducted from the recovery.

"(b.) The first and third requests are covered by the general charge.

"2. The criticisms upon the general charge made in the ninth, tenth, eleventh and thirteenth grounds of the motion for new trial are not well founded. The distinction is clearly drawn between that negligence on the part of a person killed by a railroad train which would defeat all recovery by his widow, and that which would only defeat it in part.

"(a.) There was no error in charging the jury that 'if you find it your duty to find for the plaintiff, you will look to the evidence and determine from that how much you will find. You will, in arriving at a conclusion, look to the evidence as to the age of the plaintiff's husband, the probable length of his life, the amount that he earns or would probably earn during his life, and the state of his health.'

"(b.) Nor was there any error, after telling the jury that a book had been introduced to aid in calculations which they would make, in charging them 'you can use the rules in that book, or can take any other rules or information that you possess that refer to making

calculations.' In making a calculation, the jury may apply their knowledge or information of arithmetic, without its being formally introduced in evidence.

" (c.) In regard to the diligence of the respective parties, the court charged fairly to both.

" 3. Although the court charged that if the officers of the railroad and the deceased were both at fault, the jury 'would be authorized to make such reasonable deduction,' yet where, in the same connection, he charged the rule of contributory negligence in the language of the statute, that 'the damages shall be diminished by the jury,' there was no error which requires a new trial.

" 4. Although the charge on the subject of the measure of damages was not as clear as it might have been, and dwelt somewhat upon the subject of annuities, yet there was no error which injured the defendant, and the court subsequently gave clearly the correct rule as to the measure of damages.

" (a.) The act of 1878 (Code, § 2972) clearly gives to the widow the right to recover the full value of the life of her husband for whose homicide she sues; and the jury are to determine the present value of that life.

" 5. There was sufficient evidence to support the verdict; nor was a verdict of \$5,500 in favor of a widow who sued for the homicide of her husband excessive, where it appeared that the husband had an expectancy of over twenty years of life and an annual income of about \$1,000, deductions having been made on account of contributory negligence, the effect of advancing age, and the support of the husband himself, under the charge of the court." [HALL, J., concurred specially.]

EMPLOYEE ON CONSTRUCTION TRAIN KILLED IN COLLISION OF CAR WITH COWS ON TRACK — FELLOW-SERVANT — CONTRIBUTORY NEGLIGENCE — BURDEN OF PROOF — CHARGE — VIOLATION OF RULES. — In **PRATHER v. RICHMOND & DANVILLE R. R. CO.**, 80 Ga. 427 (*July, 1888*), employee on material train killed by being thrown off the car by reason of collision with cows on track, judgment refusing plaintiff new trial after judgment rendered in City Court of Atlanta was *affirmed*, the official syllabus to the report (per opinion by SIMMONS, J.) stating the points decided as follows: " 1. Where the deceased, for whose homicide his wife brought suit, was upon a construction train which was used for the purpose of hauling dirt, rails, etc., necessary for repairing the road-bed, and it had a crew of a number of hands constantly employed, of whom deceased was

one, his business being to do anything to insure the successful working of the train, he was a co-employee with the balance of the crew, including the conductor or boss of the squad and the engineer and fireman of the engine, although at the time of the accident, the train was moving from one point to another, and deceased had no active duty to perform. *Richmond & Danville R. R. Co. v. Ayers*, 53 Ga. 12, cited, doubted and distinguished (1).

" 2. If the deceased immediately or remotely, directly or indirectly, caused the injury or any part of it or contributed to it at all, his wife could not recover. [Citing *Mitchell v. Central R. R.*, 63 Ga. 173, in its construction of Code, § 3036.]

" 3. It was not error to charge that the burden was on the plaintiff to show that her husband was without fault or that the defendant was in fault.

" 4. It was not error to charge that, if an employee received an injury from an accident which is an ordinary peril of the service undertaken by him, he cannot recover damages for such injury.

" 5. Before an employee can recover from a railroad company, he must be free from fault; and if he is killed while in disobedience of a rule of the company, or an order of the conductor given him while he is under the command of that officer, his widow cannot recover, unless it appears that such disobedience did not, directly or indirectly, contribute in any degree to the injury.

" (a.) If the employee disobey a reasonable rule of the company, or a reasonable order of the person who is in command of the squad of whom he is one, given either for the protection of the interests of the company or of the employee himself, the burden is upon the plaintiff to show that the disobedience did not contribute to the injury.

" 6. If it be shown that the employee has disobeyed the order of his superior, the burden is upon him to show that such disobedience did not contribute in any degree to the injury. [Citing *Central R. R. v. Mitchell*, 63 Ga. 173, 174; *Atlanta & Charlotte Air-Line R'y v. Ray*, 70 Ga. 674.]

" 7. It was the right and duty of the conductor in charge of the

1. The court said: "It is argued that this case is covered by the case of *Richmond & Danville R. R. Co. v. Ayers*, 53 Ga. 12. We do not think so. If that case was ruled correctly (of which I have grave doubts) it does not conflict with our ruling in this case. The facts are entirely different. In that case Ayers did not belong to that train as Prather did to this. He was a 'track-raiser,' a separate and independent employment from that of a 'train-hand' who is a part of the crew of the train."

The cases cited will be found reported with the Georgia cases in this volume of AM. NEG. CAS.

train and representing the company to give all necessary orders for the protection of the interest of the company and the safety of its servants; and if he gave an order not to sit with legs hanging over the side of the car, and it was a reasonable order, and the servant disobeyed it and was injured, he could not afterwards say it was not an order but simply advice or warning against danger; nor could he say that, while he was riding from one part of the road to another, and had nothing to do with the running of the train, it was not such an order as he was bound to obey.

"8. Even if there were errors in the charge, a new trial will not be granted, as it appears that the injury was the result of an unavoidable occurrence which could not have been prevented by the exercise of even extraordinary diligence.

"9. Some of the newly discovered testimony is cumulative in its character, and the remainder of it negative, relating principally to whether any orders were given by the conductor as to the standing up or sitting down."

**EMPLOYEE OF ONE COMPANY RIDING ON CAR THAT WAS DERAILED ON TRACK OF ANOTHER COMPANY—FELLOW SERVANT—QUESTION FOR JURY.—KILLIAN v. AUGUSTA & KNOXVILLE R. R. Co., 78 Ga. 750 (March, 1887)** was an action brought by the widow of Killian, who was in the employment of the Port Royal & Augusta R'y Co., and who was directed to accompany a train and to deliver a load of rough timber, etc., at the Sibley Mill, a point on the Augusta & Knoxville R. R. The alleged carelessness on the part of defendant consisted in the defective construction of a certain curve at a point on the streets of Augusta and over which the train had to pass. It seems from the evidence that the deceased was riding on the end car of the train, with three or four others bound upon the same mission, and that at that curve this car was derailed and plaintiff's husband was killed. There was a nonsuit in the Richmond Superior Court which, on appeal, was *reversed*. There being a conflict of evidence on the question of negligence the question should have been submitted to the jury. Whether the deceased was a co-employee with persons in employment of defendant company, who were in charge of the train, was not definitely decided; but the court referred simply to the decision of this question in the case of *Cooper v. Mullins*, 30 Ga. 146; 14 Am. Neg. Cas. 114, *ante*. Questions of practice were also decided in the *KILLIAN* case, *supra*.

A subsequent decision in the *KILLIAN* case (79 Ga. 234) states the case (as per official syllabus) as follows:

" 1. Where a train loaded with wood was transported over one railroad to a city, and at the instance of the shipper, permission was obtained from the superintendent of the road for the train to proceed over the track of two other roads to a third, and over it to the point of destination, the train being manned by employees of the first road, and a person, by direction of the superintendent of that road, accompanied the train for the purpose of seeing that it was unloaded promptly and returned to the road to which it belonged, and where an arrangement was made with the superintendent of the third road for the train to proceed over its tracks, and he directed an employee to go upon the engine and act as pilot and inform the engineer of the curves and "tight places" in the track, the only duty or obligation owed by the third railroad company to the employees of the first company upon such train was to have a reasonably safe track over which the cars were to be transported.

" (a.) This case differs from that of the Macon & Augusta R. R. Co. v. Mayes, 49 Ga. 355. There it was ruled that the company was liable to third persons and to the public for injuries resulting from a collision caused by allowing a train of another to come upon its franchise, and did not refer to an employee of the company thus using its road.

" (b.) The person sent with the train to see to the unloading and return of the cars was not an employee of the last road over which the train ran; and therefore the charges of the court as to whether he was free from fault and negligence as an employee thereof, and whether it was in fault, were not applicable to the case.

" 2. Such person was an employee of the first company, and the only obligation the last company was under as to him was to furnish him a safe track on which the train might be safely run. If it failed to do this, and he was killed solely by reason of the defect in its track, his widow would be entitled to recover therefor.

" 3. If the injury was occasioned solely by a defect in the tracks of the car belonging to the first company, she would not be entitled to recover from the last.

" 4. If the injury was caused both by a defect in the track and by a defect in the trucks, she would be entitled to recover an amount in the proportion the defect in the track as compared to that in the trucks contributed to the injury.

" 5. The last company, as to the safety of its track, was liable to him as a passenger; and if the injury was caused solely by a defect in the track, and he was not negligent or could not have avoided the injury by the exercise of ordinary care and diligence, his widow (he having been killed) would be entitled to recover the amount of

damages she has sustained. If he was negligent, but could not, by the exercise of ordinary care, have avoided the injury caused by the defendant's negligence, then the damages should be diminished as in cases of contributory negligence.

" 6. There was no error in striking from the plaintiff's declaration certain words therein in reference to the deprivation of the plaintiff of the society, company and companionship of her husband, causing her great mental pain and suffering and leaving their infant child, twelve years old, fatherless, such allegations being irrelevant to the case. Nor was there error in ruling out the testimony of the plaintiff tending to sustain the allegations so stricken.

" 7. Although the defendant had crossed a set of interrogatories sued out by the plaintiff, which had been executed and returned, yet where such defendant desired to propound additional cross-interrogatories to the witness to lay the foundation for impeaching him, it had the right to do so, and did not thereby make him its witness.

" 8. The question as to whether one of the commissioners taking the interrogatories was an attorney for the defendant, was submitted to the court, and he having determined from the evidence before him that the commissioner was not such attorney, and the evidence sustaining his finding, this court will not interfere therewith.

" 9. There was no error in admitting the answers to questions propounded to a witness as to the personal expenses of the deceased. The rule as heretofore existing in this State did not limit personal expenses of the deceased, to be deducted from the recovery, simply to his food and clothing; but his personal habits, his station in life, his means and manner of living, might be proved for the consideration of the jury, and they be allowed to deduct what they might consider from the testimony to be his reasonable personal expenses, taking all these things into consideration.

" 10. There was no error in refusing to give in charge the requests of the plaintiff set out in the cross-bill of exceptions.

" 11. The question of what is ordinary care and what is negligence is one exclusively for the jury, and the court should not take this question from their consideration. This was done in the charges given and excepted to in the cross-bill of exceptions." [See *Killian v. Augusta & Knoxville R. R. Co.*, and *vice versa*, 79 Ga. 234.]

*Employee working on railroad bridge falling to ground — Defective appliance — Nonsuit. — In GASSAWAY v. GEORGIA SOUTHERN R. R. CO., 69 Ga. 347 (November, 1882), employee injured while*

working on railroad bridge, nonsuit in the Floyd Superior Court was *affirmed*, the official syllabus to the report stating the case as follows:

"An employee of a railroad, suing the company for injuries sustained by him for the negligent performance of any act in which he participated, has not made a *prima facie* case for recovery without proving either that he was free from fault himself, or that there was negligence on the part of his fellow-servants. Any presumption of negligence would apply as well to him as to others participating in the common act, and to be benefitted by a presumption against them, he must rebut it as to himself.

"(a.) Plaintiff, a railroad employee, sued the company for a personal injury to himself. The evidence as to the accident was as follows: He was at work on a trestle some twenty feet above the ground, lining the track, using therefor a 'pinch-bar' and gauge, to make the width uniform. It was near train-time and the boss, under whom plaintiff worked, told him to hurry. Seeing an irregular place in the track, which it was necessary for safety to make uniform, plaintiff used the 'pinch-bar' as a lever to push the track into position, resting one end of the bar upon the stringer of the bridge. Failing to move the track on the first and second efforts, plaintiff stooped and threw his weight against the short bar which he was using. The wood of the stringer on which the bar rested split off, and plaintiff fell to the ground, breaking his leg. *Held*: that a *prima facie* case was not made out, and a nonsuit was right."

FALL OF RAILROAD BRIDGE AND SCAFFOLD — EMPLOYEE KILLED — STATUTE — STARE DECISIS — CONSTITUTIONAL LAW.— In **GEORGIA RAILROAD v. IVEY**, 73 Ga. 499 (1884), fall of railroad bridge and scaffold, and plaintiff's husband, working on said bridge, killed, judgment for plaintiff in the Clarke Superior Court for \$6,000 was *affirmed*.

The syllabus by the court, in the Ivey case, is as follows:

"1. In the case of the Central Railroad *v.* Thompson, 54 Ga. 509, it was held that, under the statute law of this State, a railroad company is liable for injuries to the person of an employee by the negligence or misconduct of other employees of the company, without negligence on his part, whether such injuries are connected with the running of trains or not. That decision has stood for nine years, and the doctrine of *stare decisis* applies.

"(a.) Leave granted to review that case.

"(b.) That no property has passed and no rights vested under it,

does not prevent the doctrine from applying. It was the construction of a statute in reference to the legal status of all employees of railroad companies, and became settled law; and it entered into every contract between the master and servant, and regulated their rights.

" 2. The fact that there may have been no other recovery under the ruling made in that case, or that the plaintiff therein having died from causes disconnected from the injury, that action abated, would not affect the principle ruled.

" (a.) That other points ruled in that case had since been modified or reconciled with other rulings while the principle now reviewed had been tacitly recognized, would strengthen, not weaken it.

" (b.) The case of *Henderson v. Walker, Receiver*, 55 Ga. 481, was, in fact, decided before the case of *Central R. R. v. Thompson*, 54 Ga. 509, though contained in a later volume of reports.

" 3. The construction put on sections 3033, 3036, of the Code, in the case under review has never been doubted, but has been several times impliedly affirmed.

" 4. The statutes regulating liability of railroads to employees injured by the negligence of co-employees are not special laws, and are not obnoxious to the provision in the constitution that 'laws of a general nature shall have uniform operation throughout the State, and no special law shall be enacted in any case for which provision has been made by an existing general law.' Nor is this a special law affecting private rights, which is unconstitutional as varying the general law without the 'free consent in writing of all persons to be affected thereby.'

" 5. The verdict is supported by the evidence.

" (a.) Sections 3033, 3034 and 3036 of the present Code were contained in the Code of 1863, forming a distinct article on the subject of injuries by railroad companies, and regulating their liability to strangers and employees, not only for injuries resulting from the running of trains, but for damages done by any person in the employment and service of the company. This law was recognized, ratified and made constitutional by the constitutions of 1865 and 1868.

" (b.) If the injured person be, at the time of the injury, in the service of the company, if without fault he may recover, if at fault he cannot recover. Any other person may recover, though at fault, but the recovery will be less on account of such fault."

EMPLOYEE INJURED BY DEFECTIVE DERRICK — DEFECTIVE APPLIANCE — ERRONEOUS NONSUIT. — In JACKSON v. GEORGIA RAILWAY, 77 Ga. 82 (1886), judgment of nonsuit in the Morgan Superior Court was *reversed*, the official syllabus stating the case as follows: "The plaintiff brought an action against the defendant for personal injuries received from the falling of a derrick used in the digging of a well for the defendant. The testimony for the plaintiff was, in brief, as follows: He was in the employment of the defendant as an ordinary railroad hand; one Palmer employed him; Palmer and his son superintended the work on that section. The hands were engaged in digging a well for the defendant, and for that purpose used the derrick. The plaintiff had not been there on Monday, but on Tuesday morning he went to work with the others. The younger Palmer, who had charge of the hands, ordered the plaintiff to go up on the derrick and unscrew one of the guy poles. The plaintiff stated that he had heard some of the hands say that the guy-pole had been cracked on the day before, and asked if it was so, and if there was any danger in going up. Palmer replied, with an oath, that it was none of the plaintiff's business; that there was no danger at all; and if he did not do as directed he could leave there at once. The plaintiff went up carefully and unscrewed a nut from the pole, but had not taken out the pieces that held it, when the guy-pole broke some distance below, and the whole derrick fell, throwing the plaintiff about twenty feet and injuring him. The plaintiff did not know that either of the guy-poles had been cracked, but he had heard some one say that one of them had been damaged, and therefore asked the 'boss' if it was so. A witness for the plaintiff stated that the younger Palmer, the 'boss,' knew that the guy-pole was cracked, and that the pole broke at the point where it was cracked. *Held*, that it was error to grant a nonsuit. The evidence certainly had a tendency to show negligence on the part of the defendant, and the case should have been submitted to the jury."

EMPLOYEE INJURED BY DEFECTIVE LADDER — FAILURE TO INSPECT — NONSUIT. — In BOLTON v. GEORGIA PACIFIC R'Y CO., 83 Ga. 659 (1889), judgment of nonsuit in the Fulton Superior Court was *affirmed*, the rulings being stated in the official syllabus as follows:

"To an action against a railroad company for injuries received in Alabama from defective materials furnished to its servant, an amendment declaring on an Alabama statute giving a right of recovery on other grounds, adds a new cause of action, and is not

allowable. Such amendment might be made if the statute were invoked, though defectively, in the original declaration. But though the declarations set forth all the facts required by the statute to be pleaded, they were mere surplusage, and without legal vitality in the absence of reference to the statute itself. [Citing *South Carolina R. R. Co. v. Nix*, 68 Ga. 572, 8 Am. Neg. Cas. 118; *Exposition Cotton Mills v. Western & Atlantic R. R. Co.*, 83 Ga. 441.]

" 2. The injuries having been received by the use of a temporary ladder made by a helper under the plaintiff, who knew that it was so made and failed to examine it, testimony as to the saying prior to the accident, by one higher than he in authority, with reference to the complaints as to the inefficiency of the helper, that he would be discharged as soon as possible, was inadmissible; no one representing the company having induced the plaintiff to use the ladder.

" 3. A good ladder having been provided by the company, if the helper constructed the temporary one with defective lumber, and the plaintiff, at his suggestion, used it instead of the one furnished by the company and was injured, he could not recover. [Citing on question of rights of servant to recover from the master at common law, *Ga. R. R. Co. v. Nelms*, 83 Ga. 70, 29 Cent. L. J. 354, 14 Am. Neg. Cas. 181, *ante*].

*Employee injured in railroad company's shop — Falling from ladder — Negligent act of fellow-servant.*

In *GEORGIA R. R. & BANKING Co. v. HICKS*, 95 Ga. 301 (1894), judgment for the plaintiff in the City Court of Richmond county was reversed for erroneous instructions as to statutory liability of the railroad company and burden of proof. The facts of the case were as follows: " Hicks sued for personal injuries sustained by him while working in the railroad company's shops. He obtained a verdict, and the company excepted to the refusal of a new trial. The declaration alleges that he was a practical and experienced plumber and gas-fitter, and was directed to put on the ceiling of the car-shops a line of inch gas-pipe. The ceiling was about sixteen feet high, and he was furnished with a ladder and a man servant of the defendant to assist him in putting up the pipe. He began the work in the usual and proper way, and put up and fastened three sections of the pipe, each weighing about twenty-six pounds and being sixteen or eighteen feet long. He moved his ladder and screwed a fourth section to the third section, and, standing upon the top round of the ladder, which rested securely against the wall, he held the screwed end of the pipe securely on his left shoulder and was pressing it up firmly against the timbers to drive in the

hooks by which it was to be permanently held. Williams, the servant assisting him, was standing on a pile of lumber about four feet high and about twelve feet from plaintiff, holding up the unfastened and loose end of the pipe with a stick about ten or twelve feet long, in the end of which Williams had cut a fork to hold the pipe. Without any notice or warning, and while plaintiff was exercising all due care and caution, Williams negligently and suddenly let go the pipe at his end, by means of which the heavy pipe began suddenly and irresistibly to fall, thereby pressing down in a horizontal instead of a perpendicular direction, throwing plaintiff from his balance and from the ladder to the floor, and greatly injuring him in manner described. The fall was due to the negligent and unskillful manner in which Williams held his end of the pipe; plaintiff was in the regular performance of his duty, was exercising care and skill, was putting up the pipe in a workmanlike manner; and the falling of the same was not in any way the result of his negligence or want of care, but was due entirely to the negligence of Williams."

*Laborer injured by breaking of rope — Inspection — Accident — Nonsuit.*

In REID *v.* CENTRAL R. R. & BANKING CO., 81 Ga. 694 (1889), judgment of nonsuit in the Houston Superior Court was *affirmed*, the official syllabus to the report stating the case as follows: "A nonsuit was properly granted. So far as the testimony shows, the rope furnished plaintiff (a well-digger by occupation) by the defendant, for the purpose of cleaning out the well in question [a well along the line of the road], and by the breaking of which the plaintiff was injured, was a good rope. It was carefully examined by both the plaintiff and the overseer of the road, and there was no defect in it which could be discovered by the use of ordinary care. There was no negligence shown by the testimony on the part of the plaintiff or defendant; both parties pronounced the rope good. It appears from the evidence to have been one of those accidents which could not have been foreseen, so as to have been provided against by either party."

*Employee struck in the eye by piece of iron from tool used by another employee.*

In McNALLY *v.* THE SAVANNAH, FLORIDA & WESTERN RAILWAY COMPANY (and VICE VERSA), 86 Ga. 262 (October Term, 1890), judgment granting defendant company new trial was *affirmed*, the official syllabus stating the case as follows: "The servant of a railroad company who is injured by a rare and peculiar accident,

such as being struck in the eye by a flake of iron knocked from a swage worked on by other servants and shown to have been in average condition, cannot recover damages from the company for such injury, his place of labor being elsewhere than at the place where the swage was located, but his call there being to procure a bolt needed in his department."

## THE AUGUSTA RAILWAY COMPANY v. ANDREWS.

*Supreme Court, Georgia, March Term, 1892.*

[Reported in 89 Ga. 653.]

- PRACTICE — NEW TRIAL — DECLARATION — EMPLOYEE INJURED BY ELECTRIC WIRE.** — 1. Where the court entertains a motion for a new trial and renders judgment denying a new trial, the presumption is that the denial is an overruling of the grounds stated in the motion, and was not influenced by matters of mere practice, such as the time of filing the brief of evidence, etc. Any point of practice raised by the respondent fatal to the motion should be presented by a motion to dismiss the application for a new trial, and if not so presented, will be considered as waived. If so presented and overruled, and the judgment overruling it is not excepted to, this also will be a waiver. *Obear v. Gray*, 73 Ga. 455.
2. The plaintiff's declaration as amended, not alleging that he had permission from the owner of the electric system on which he had entered at the time he was injured, to come in contact with its wires or to climb its pole in the prosecution of his business for another company, or that the defendant knew of his presence at the scene of the injury, which was up in the air, some twenty-three feet or more from the ground, the declaration set forth no cause of action, and a general demurrer thereto should have been sustained.
3. As the court should have sustained the demurrer, all the subsequent proceedings were erroneous.

(*Syllabus by the Court.*)

**APPEAL** from judgment for plaintiff in the City Court of Richmond county. *Judgment reversed.*

J. S. & W. T. DAVIDSON, for plaintiff in error.

TWIGGS & VERDERY, for defendant in error.

**Simmons, J.** — According to the declaration, there was in the city of Augusta, at the time of the alleged injury, a system of electric wires operated by the defendant, the Augusta Railway company; there was also another system, consisting of the fire-alarm wires of the Augusta Fire Department; and the plaintiff was employed in putting up wires for a third, that of a telephone

company. In stringing the wires on the poles, it became necessary at a certain point for the plaintiff to place the telephone wire above and across the fire-alarm wire, and for that purpose he ascended a pole of the fire-alarm system, to the height of the wire, and while attempting to place the telephone wire over and across the fire-alarm wire, received from the latter a shock which caused him to fall to the ground, a distance of some twenty-three feet, by which means he was seriously injured. He charges that his injuries "were caused solely by the carelessness of the defendant company in so negligently constructing, using and operating what is known as its 'feed-wire' \* \* \* as to permit and allow the same to come in contact with the said fire-alarm wire, at the intersection of" two named streets of the city; "and negligently and carelessly failing to separate and keep separated at a safe and proper distance its said feed-wire and said fire-alarm wire at the time and point indicated;" "that there was being transmitted over said feed-wire at the time petitioner received said injuries a powerful and deadly current of electricity used to propel the cars of the defendant, which current was carried over said fire-alarm wire from said point of contact to the place where petitioner was working as aforesaid, and thence into and through his body;" and that the "fact of contact of said feed-wire and said fire-alarm wire was known, or by proper diligence might have been known to the defendant." The declaration was demurred to on several grounds, one of which was that it set out no legal cause of action. The demurrer was overruled, and the defendant excepted.

Whether, so far as concerned the safety of the public who pass along the streets and under the wires, it was the duty of the railway company or of those in charge of the fire-alarm system, or of both, to place guard-wires under and over their electric wires, to prevent contact, it is unnecessary now to decide. Under the facts alleged, we are clear that the plaintiff was not entitled to recover. He does not allege any facts going to show that the defendant company was under any duty or obligation to protect him at the time or place of the injury. He does not allege that he had permission from those operating or in charge of the fire-alarm system to climb its poles in the prosecution of his business. Without permission and without notice even, so far as appears from this declaration, he climbed the pole and became a trespasser upon the fire-alarm system. He had no right to go upon

the pole without permission; and when he did so, he took the risk incident to the trespass. If he had obtained permission from those in charge of the fire-alarm system to climb their poles to carry on his business, he would have been in a position somewhat analogous to that of a servant of the licensors, and if, while acting in pursuance of the license, he had been injured by the negligence of the railway company, he might be entitled to recover. Or if he had been upon the street, or in any place where he had a known right to be, and had been injured by the negligence of the railway company, he would be entitled to recover. Whatever may be the reciprocal duties of electric companies between themselves, as to guard-wires, etc., each must see to it, up to the measure of full diligence, that the public is protected upon the streets from the danger of contact with its wires when charged with the deadly electric fluid. If a person, however, leaves his proper place in the street or highway, and climbs a pole twenty-three feet high which supported an electric wire, taking with him a wire to throw across the one on the pole, and does this without permission from the company whose system he has thus entered upon, and by reason of the contact of that company's wire with the "feed" wire of another company is injured, he cannot recover from either company. If the plaintiff had given the railway company notice that he was going up the pole, or if it had reasonable grounds to believe that he was on the pole, and it had known or ought to have known that its wire was in contact with the other wire, it might be liable to him for injuries received by him on account of its negligence. But the plaintiff does not allege that the defendant had notice of his being on the pole, or that it had any grounds for believing that he would be on the pole. We therefore think that, in any view of the case, the court should have sustained the general demurrer and dismissed the action.

As the court should have sustained the demurrer, all the subsequent proceedings were erroneous, and it is not necessary to discuss them.

The rule of practice in relation to motions for new trial before the trial court is sufficiently set out in the first headnote.

Judgment reversed.

EMPLOYEE ENGAGED IN PLACING TELEGRAPH POLES ALONG RAILWAY FALLING FROM CAR AND RUN OVER — SUDDEN JERK OF TRAIN — WITNESS — AGE — EVIDENCE — EXPERT AND OPINION EVIDENCE — LIABILITY OF RAILROAD. — In *CENTRAL RAILROAD v. COGGIN*, 73 Ga. 689 (*September Term, 1884*), judgment for plaintiff for \$1,250 in the Bibb Superior Court was *affirmed*. The case will be found fully reported in a previous decision (see 62 Ga. 685), and the present appeal shows the following facts: "Under a contract between the Western Union Telegraph Company and the Macon and Western Railroad, the poles of the former were being delivered along the line of the latter. There was a conductor, White, and an engineer, Orr, on the train, who controlled its movements. Plaintiff was one of the hands of the telegraph company, under the control of one Awtry, the foreman. The poles were piled on flat cars. Three hands were engaged in throwing poles from the car. It did not stop, but moved slowly along at a uniform speed, and the heavy end of the pole was cast off, and the entire pole was thus pulled from the train by its own weight and the motion of the car. Two other hands on the same car were engaged in placing the poles in position. Plaintiff was one of these. While the train was running on a slight upgrade, and while plaintiff had hold of the end of the pole, the train jerked violently, so that he relaxed his hold, fell from the car and was run over and injured. The speed had been slackened to allow the switchman, who had just changed the switch, to get on; and the increase of speed occurred without any warning. If steam is shut off from an engine, the box-cars run up on the engine; and the effect of shutting off steam was to make the cars run up on the engine and make a little 'slack.' There was no necessity for the jerk at the place, so far as he could see; a skilful engineer can avoid jerks to a certain extent. He has since had two years' experience in running an engine. The injury occurred near a switch. After testifying substantially to these facts, plaintiff further stated that, as the train passed the switch going up, the engineer was in a hurry to make a station above, in order to meet the night passenger train, and he slacked up for the switchman to get on the train, he seemed to have shut off his engine, 'and he opened his engine right suddenly, I suppose.' Didn't know what the engineer was doing; all that he knows is that the train was running along very slowly, and a sudden jerk threw him down. He knew it was a jerk of the engine, from experience and sense. He had no experience at the time as to running of engines. He knew the jerk was from the engine. He heard the exhaust of the engine when it

started off. By exhaust is meant the steam escaping from the engine, and that cannot be done while the engine is standing still; and he heard the exhaust just about the time he was jerked. When you stop the engine, running up or down hill, or on a level, the cars run up on the engine. They never run backwards. The jerk is caused by the taking up of the 'slack' between the couplings. When an engine is stopped and there is a 'slack,' and it starts off, as it pulls up the slack it jerks each car, and when there is no slack there is no jerk, no matter how much steam is put on. If the couplings are all stretched out to the fullest extent and the couplings are all taut, there is no jerk only at the last car, and if that is also taut, the whole train moves off like a piece of solid wood, if in the hands of a skilful engineer. The train left Macon an hour after the appointed time. The engineer came back, and was excited and hurried. He wanted to reach the station above, so as to meet the down passenger train.

"On the subject of the extent of the loss caused by his injury, plaintiff testified, in brief, as follows: Was sixteen years old at the time; was twenty-one on the 8th of February, 1875. He was receiving \$40 a month at the time and his board; he rates his board at \$15 per month. Is not able to perform the same duties now as he was then. Sometimes can't stand a half hour on his leg, but has to rest. Has a dead aching which has continued ever since it was done — most violent in cloudy weather. No human being can explain the pain he suffered when the injury was done; had rather be shot or cut through. Has tried to learn the painter's trade, and has been working at it since, but on account of his injuries cannot stand on a ladder, but has to stand on the ground. Does sign painting, and if he could get plenty could make a living. With his capacity, could make from \$2.50 to \$3 a day, if he could work all the time. As it is, does make \$1.50 a day. His capacity for labor has been diminished one-half.

"The evidence for the defendant was, in brief, as follows: Awtry was the foreman of the telegraph squad, and the train was to be run as he instructed. He instructed the engineer, and if the engine ran too slow or too fast, required him to change accordingly. He was on the engine with the engineer, conductor, fireman and wood-passenger. He was there to show the men how to drop the poles and to tell the engineer how to run. The latter was a good, experienced and careful engineer, and the train was running slowly on a steep up-grade. It was not checked for the person who changed the switch to get on, nor was there any slacking. The steam was not taken off or put on suddenly. At the speed at which the train

was going and with the load which it had, the putting on of steam could not have produced a jerk, but would only have caused the speed to increase. If the steam had been suddenly taken off, the train would have stopped almost immediately; the car wheels would have rolled up a little towards the engine, but would have gone back as soon as they stopped, until the coupling became taut again. The engineer testified that, with the speed at which they were going, he did not suppose that the car would have run up on the engine at all. He denied being behind time or in a bad humor, or that there was any complaint of him made that morning. The conductor had charge of the train generally, but it was run according to the instructions of Awtry as to speed and stoppages. The train had no regular schedule time, but was run slowly for the purpose of distributing the telegraph poles, and they had only to keep out of the way of regular trains. There was no putting on or taking off of steam, and no sudden jerking.

"The jury found for the plaintiff \$1,250. Defendant moved for a new trial, on the grounds set out in the decision, which motion was overruled, and exception was taken." [R. J. Lyon, appeared for plaintiff in error; Bacon & Rutherford, for defendant in error.]

The opinion in the COGGIN case, *supra*, was rendered by HALL, J., and the points decided are stated in the official syllabus as follows:

- "1. The verdict is supported by the evidence.
- "2. The question of negligence was fairly submitted to the jury and the rule on this subject has been too long settled and too uniformly applied to admit of further qualifications or modifications.
- "3. The charges of the court excepted to in the fourth, fifth and sixth grounds of the motion for new trial are in accordance with the law as declared in this case when it was formerly before this court (62 Ga. 685), and it is binding therein.
- "4. A witness may testify to his age, without first requiring him to show from what source he derived his information, and when and where he was born. The correctness of his statement may be tested on cross-examination by asking whence he derived his information and likewise the time and place of his birth; but on such subjects hearsay evidence is admissible from the necessity of the case.
- "5. Where one was injured by an accident on a railroad, after having shown the nature and character of the injury received and the reduction of his wages growing out of infirmities consequent thereon, he could testify as to the extent to which his capacity to labor was diminished in consequence of the injury he had received.

" 6. Taken in connection with other facts to which he deposed, it was not error to permit the plaintiff to testify that 'as the engineer slacked up for the switchman to get on the train, he seemed to shut off his engine, and the car ran up on the engine, and he opened his engine right suddenly, I suppose.' The supposition related only to the sudden opening of the engine, and amounted to nothing more than an opinion that such was the case. And where the subject under investigation is a proper one to be illustrated by the opinions of experts, unskilled persons may give their opinions, provided they accompany them with the facts from which such opinions are deduced."

*Negligence — Disobedience of rules — Question for jury.*

In SOUTHERN RAILWAY Co. v. BASTON, 99 Ga. 798 (*October Term, 1896*), there are no facts stated, but the syllabus by the court announces the points decided as follows:

" 1. Negligence on the part of an employee of a railroad company which in no way contributes to injuries received by him in consequence of its negligence, will not prevent a recovery by the employee for such injuries.

" 2. There being in the present case affirmative evidence warranting a finding that the plaintiff's injuries were caused by the negligence of the defendant company, he was entitled to recover, unless his own negligence in violating the company's rules contributed to the catastrophe by which the injuries were occasioned. The question whether his disobedience of these rules did so contribute was fairly submitted to the jury, and this court cannot, in view of the entire evidence, undertake to say that their finding upon this question was wrong.

" 3. No new question of law is presented, and there was no error requiring a new trial."

EMPLOYEE FALLING INTO PIT NEAR TRACK AFTER ALIGHTING FROM TRAIN — CONTRIBUTORY NEGLIGENCE.— In CENTRAL RAILROAD v. HENDERSON, 69 Ga. 715 (*February, 1883*), judgment for plaintiff for \$10,000 in the Scriven Superior Court was *reversed* on the grounds stated in the official syllabus to the report as follows:

" 1. If one as agent of a railroad company accepted a free ticket therefrom, and while traveling over the road free of charge, upon leaving the train near a depot, was injured, he would be estopped from denying the existence of his agency.

" (a.) Though one may be an employee of a railroad company,

yet if his agency is disconnected from the running of trains, and, while traveling, he is injured by the running of a train, he stands in the position of a passenger, and will not necessarily be precluded from recovery by the existence of some degree of negligence on his part; but in such a case the doctrine of apportionment of damages on account of contributory negligence may apply. But where the injury did not result from the running of trains, and was disconnected therefrom, but resulted from the existence of a dangerous hole in the ground held by the company in connection with its depot, at which the injured party was an agent, it would be necessary for him to be wholly blameless to authorize a recovery.

"(b.) If the plaintiff was an employee of the road, and was injured by co-employees engaged in business other than the running of trains, it does not matter that he was not connected with them in regard to the pit where the injury occurred; to recover he must be blameless.

"2. Where one, at his own request, was put off of a railroad train at a point some distance from the depot on a dark night, but reached the depot in safety, and afterwards, instead of following the public road, relied on his knowledge of the locality and sought to follow a by-path which passed a pit on the land of the railroad, which he himself had formerly cleaned out, and to carry his own baggage along such pathway in the dark, if he missed the path, fell into the pit and was injured, he could not recover, although the underbrush and shrubbery around and in the pit had been cut by the railroad hands, according to their custom of annually clearing the right of way, and though this had been done while plaintiff had been absent from home and without his knowledge, and a snag left in the pit injured plaintiff when he fell. The real cause of the injury was plaintiff's own negligence."

#### **Actions against receivers for injuries to railroad employees.**

##### ***Receivers not liable for injuries to employees.***

In **HENDERSON v. WALKER ET AL., RECEIVERS**, 55 Ga. 481 (1875) it was held that "receivers of a railroad, holding possession for a court of chancery, and operating the road under the orders of that court, are not subject in their official capacity, for a personal injury to one of their employees, resulting from the negligence of others of their employees in the same service." Held, also, that "such a suit being brought, by leave of the court improperly granted, it was proper to revoke the order granting leave, and to dismiss the action." Judgment rendered in the Floyd Superior Court affirmed. The Supreme Court (per BLECKLEY, J.), in the opinion,

said: "A new and interesting question in the jurisprudence of our State is made in this record. Receivers were in possession of a railroad under a court of equity, operating it and using its franchises under the orders of that court. One of their employees, whilst engaged in working upon a bridge on the line of the road, received a personal injury, in consequence of the negligence of his co-employees in the same service, his leg being broken from some improper handling of a rope used in erecting the structure. He petitioned for leave to bring suit against the receivers and it was granted. He brought suit accordingly against them in their official capacity. A motion was made at the trial, in behalf of the defendants, to dismiss the declaration; it was sustained. The declaration was dismissed, and the order granting leave to sue was rescinded, on the ground that there was no cause of action." The court ruled, as per the foregoing statement, that the plaintiff could not recover against the receivers, as the latter did not represent the railway company, but the court.

In *YOUNGBLOOD v. COMER, RECEIVER*, 97 Ga. 152 (1895), and *Patterson v. Central R. R. & Banking Co. et al.*, 97 Ga. 152 (1895), it was held that the decision in the cases of *HENDERSON v. WALKER ET AL., RECEIVERS*, 55 Ga. 481 (1875) and *THURMAN v. CHEROKEE R. CO.*, 56 Ga. 376 (1876), were controlling, such cases holding that when a railroad company is in the hands of and being operated by a receiver, neither the company nor the receiver is subject to suit by an employee for personal injuries occasioned by the negligence of a co-employee. Judgments for defendants in the City Court of Atlanta were affirmed. The opinion was rendered by SIMMONS, Ch. J., but ATKINSON, J., while concurring in the judgments rendered, being bound by the rulings in the cases cited, dissented from the majority opinion declining to overrule those cases.

In *BROWN v. COMER ET AL., RECEIVERS*, 97 Ga. 801 (1896), it was held that "although the property of a railroad company was put into the hands of a receiver upon its own petition, the question of his liability to his own servants engaged in operating the railroad is nevertheless controlled by the decision of this court in the case of *HENDERSON v. WALKER*, 55 Ga. 481, recently affirmed in the case of *YOUNGBLOOD v. COMER*, 97 Ga. 152 (see preceding paragraph); and consequently such a receiver is not liable to one of its employees for personal injuries occasioned by the negligence of a co-employee." Judgment for defendants in the City Court of Richmond county affirmed.

In *THURMAN v. CHEROKEE R. R. CO.*, 56 Ga. 376 (1876), employee injured while the railroad was in the hands of a receiver, it was held

that an employee could not maintain an action against the company for injury sustained by him while the road was in the hands of a receiver. Following the ruling in *Henderson v. Walker*, 55 Ga. 481. Judgment sustaining demurrer to declaration *affirmed*.

*ROBINSON v. HUIDEKOPER ET AL. (RECEIVERS OF THE RICHMOND & DANVILLE R. R. CO.)*, 98 Ga. 306 (1896), was an action brought by an employee for injuries sustained in jumping from the cab of the locomotive he was running in order to escape injury from escaping steam and water caused by defective appliance. Judgment for defendants in the City Court of Atlanta was *affirmed*. The rulings of the court are stated in the official syllabus to the report as follows:

" 1. According to the principle laid down by this court in *HENDERSON v. WALKER ET AL., RECEIVERS*, 55 Ga. 481, which was reviewed and affirmed in the case of *YOUNGBLOOD v. COMER, RECEIVER*, 97 Ga. 152, special statutes enacted for the purpose of fixing and arriving at the liability of railroad companies, and relating expressly and exclusively to such companies, cannot, by implication or interpretation, be held applicable to receivers of a railroad operating it under the orders of a court.

" 2. This being true, there is, so far as such receivers and their servants are concerned, no law in this State, changing the common law rules of evidence applicable to actions by servants against masters for personal injuries; and, therefore, upon the trial of an action against such receivers by one of their employees for injuries of this kind, alleged to have been caused by the defendant's negligence, there is no presumption of law that they were negligent, but it is incumbent upon the plaintiff to prove affirmatively that such was the fact.

" 3. There being, in the present case, no evidence showing that the defendants were negligent, the verdict in their favor was the only legal one which could have been rendered; and therefore whether the rulings of the trial judge complained of in the motion for a new trial were, or were not, erroneous, that motion was properly overruled."

*Receivers held liable for injuries to railroad employee.*

In *SPENCER ET AL., RECEIVERS (RICHMOND & DANVILLE R. R. CO.) v. BROOKS*, 97 Ga. 681 (1896), judgment for plaintiff, a minor employee, for \$1,500, in the City Court of Atlanta, was *affirmed*. Plaintiff was a brakeman on a freight-train, and on the occasion of the accident, was ordered by his vice-principal to open the knuckle of the patent bumper of a freight car preparatory to attaching the car to the car attached to the engine of the freight-train on which

he was brakeman. The car and the train were both stationary, but while plaintiff was performing the work ordered the engine was suddenly backed, without warning, and struck plaintiff who at once sprang to the side of the track to extricate himself from danger, but owing to the defective condition of the track fell into a space and was thrown violently to the ground between the two cars and was seriously injured. The official syllabus states the case as follows:

" 1. A written contract of service between one of its employees and a railroad company which, after the making of such contract, is put into the hands of receivers who retain this employee in their service, is not necessarily and at all events binding between the receivers and the employee. To make it so there must be, as between the parties, some agreement to this effect, either express or implied.

" 2. As a general rule a conductor in charge of a regular passenger or freight-train and having, as such conductor, full control of its movements is not, while in the performance of his usual and ordinary duties with reference thereto, a fellow servant of an engineer, fireman or brakeman working under his orders. Under such circumstances the conductor is the vice-principal of the railroad company or of receivers operating it under the orders of a court.

" 3. There is nothing in the facts of this case taking it out of the rule above stated, and the charges complained of being, under the evidence, adjusted to this rule, were not improperly based upon the assumption that the plaintiff and the conductor were not fellow-servants; nor were they in other respects erroneous.

" 4. The evidence warranted the verdict, and there was no error in denying a new trial."

STREET-RAILWAY EMPLOYEE RIDING ON CAR STRUCK BY POST NEAR TRACK — CONTRIBUTORY NEGLIGENCE.—In *SUNDY v. THE SAVANNAH STREET R. R.*, 96 Ga. 819 (*October, 1895*), judgment of nonsuit in the City Court of Savannah was *affirmed*, the case being stated by SIMMONS, Ch. J., in the official headnote, as follows:

" 1. The plaintiff's husband, an employee of the street railway company, having been killed by coming violently in contact with a post very close to the track, while he was riding on the front end of an extra car upon which he was being sent to the relief of a disabled car of the company, and it appearing that at the time of the collision he was standing on the steps of the platform, leaning outwards and looking backwards underneath the car on which he was

riding, and there being no evidence showing that he was then under any necessity or duty of being in the position, it does not affirmatively appear that he was free from negligence.

"2. Although the evidence warranted a finding that locating the post so near the track was a negligent act, it does not show that so doing was violative of any duty due by the company to the deceased at the time he was killed, and therefore this act was not, relatively to him, a negligent one; and as no other negligence was alleged or proved against the defendant, the plaintiff failed to establish that, so far as her husband was concerned, the company was negligent at all.

"3. It follows from what is said above, that there was no error in granting a nonsuit." [DENMARK & ADAMS, appeared for plaintiff; LAWTON & CUNNINGHAM, for defendant.]

*Railroad not liable for injuries to laborers in employ of contractor.*

In CENTRAL RAILROAD & BANKING Co. v. GRANT and CENTRAL RAILROAD & BANKING Co. v. O'HARA, 46 Ga. 417 (*July Term, 1872*), it was held that "a railroad company is not liable for injuries sustained by laborers in the employ of a contractor who was working for said company, though it may have furnished implements and materials for the performance of such work." It appeared that the plaintiffs were employed by a Mr. Names, as overseer, of a gang of men, and were paid by him; that a Mr. Adams was the contractor for the work; that plaintiffs were engaged in filling in an embankment with a dirt car; that the trestle gave way and the car fell off, injuring plaintiffs, etc. The two cases were heard together, and there was a verdict for plaintiffs which, on appeal, was reversed.

*Liability of independent contractor for personal injuries*

In FULTON STREET R. R. Co. ET AL. v. McCONNELL, 87 Ga. 756 (*October, 1891*), it was held that: "Where a street railway company, having authority under its charter to construct a railway in the public street, does the work by an independent contractor, and an injury to a person passing along the street is caused by the negligence of a servant of the contractor, which negligence consisted in unnecessarily and improperly laying down loose iron rails in advance of the workmen engaged in constructing the track, the contractor is liable for the consequences of such negligence, but the railway company is not, the latter company not having reserved any control over the conduct of the former in executing the work." Citing ATLANTA & FLORIDA R. R. Co. v. KIMBERLY, 87 Ga. 161 (action arising out of an injury caused by a nuisance).

On the subject of liability of employers and independent contractors for injuries to employees and others caused by negligence, the opinion of Mr. Justice SIMMONS in ATLANTA & FLORIDA R. R. Co. v. KIMBERLY, 87 Ga. 161, will be found interesting in its discussion of authorities on that topic.

*Person killed by agent of railroad company — Liability of company.*

In CHRISTIAN v. COLUMBUS & ROME R'Y CO., 79 Ga. 461 (*March, 1888*), an action for homicide of plaintiff's husband, the declaration alleged that her husband, while in the agent's office for the transaction of business pertaining to the agency, the business of the husband being with the company, was killed by the agent; and also alleged that the agent was subject to disease and aberration of the mind, and that the company employed him knowing the fact; his disease was or became at intervals homicidal mania. Demurrer was sustained on the ground that the facts did not set out cause of action and lack of jurisdiction; the action being brought in Harris county where homicide was committed and not in Muscogee county where the charter located the principal office of the corporation. On appeal judgment of Harris Superior Court was *reversed*, the court holding that the company was liable under Code, § 3033, rendering railroad companies liable for damages done by any person in their employment and service, unless their agents have exercised all ordinary care and diligence. It is also held that the county in which the homicide was committed had jurisdiction. Citing Ga. R. R. v. Oaks, 52 Ga. 410, where it was held that a widow suing for the homicide of her husband may bring her action in the county in which the homicide was committed. Code, § 3406.

On the trial of the CHRISTIAN case, plaintiff obtained a verdict for \$12,999.94, from which plaintiff remitted \$4,314.94, and the trial court granted a new trial. On appeal judgment was *affirmed*. 90 Ga. 124 (1892).

**ASSAULT BY LICENSEE ON COMPETITOR ON PREMISES OF RAILROAD — LICENSEE NOT SERVANT OR AGENT OF THE CORPORATION — RAILROAD NOT LIABLE.** — In FLUKER v. GEORGIA R. R. AND BANKING CO., 81 Ga. 461 (1889), judgment of nonsuit in the Greene Superior Court was *affirmed*, in an action for alleged assault by licensee upon plaintiff's servant, the points decided being stated in the official syllabus to the report as follows:

" 1. The dominion of a railroad corporation over its trains, tracks and 'right of way,' is no less complete or exclusive than that which

every owner has over his own property. Hence, the corporation may exclude whom it pleases, when they come to transact their own private business with passengers or other third persons, and admit whom it pleases, when they come to transact such business. This applies to selling lunches to, or soliciting orders from, passengers for the sale of lunches.

" 2. A mere implied license, no matter how long enjoyed, to transact such business, for which no consideration has been paid, is revocable at any time, and such revocation results from notice not to prosecute the business in the future.

" 3. One who persists in using the license after notice of its termination, may be prevented from so doing by such force, not extending to life or limb, as may be necessary to effectuate his expulsion from the premises.

" 4. A lessee or licensee of the exclusive privilege of entering the cars or upon the right of way to sell or supply lunches, is not a servant or agent of the corporation, so as to render it liable for an assault, or an assault and battery, committed by such lessee or licensee upon a competitor who seeks lawfully, on his own premises, to obtain the patronage of passengers.

" 5. A master has no right of action for an assault, or an assault and battery upon his servant, unless some loss of service or capacity to serve results therefrom."

*Passenger injured by sudden jerking of train — Breaking of coupling pin.*

CENTRAL RAILROAD *v.* FREEMAN, 75 Ga. 331 (1885), was an appeal by the company from verdict and judgment for plaintiff, a passenger, in an action for personal injuries. There has been two trials of the case, both verdicts being in favor of the defendant. There was no appeal from the grant of the first new trial but defendant appeals from verdict for plaintiff on the second trial. Judgment in Bibb Superior Court *affirmed*. Plaintiff was injured by the breaking of a coupling-pin caused by an improper and unnecessary jerk of the train by the engineer's sudden application of steam.

*Person standing near track struck by piece of wood thrown from train.*

In FRAZER ET AL. *v.* THE CHARLESTON & SAVANNAH RAILWAY, 75 Ga. 222 (*October Term, 1885*), judgment of nonsuit was *reversed* on the grounds stated in the official syllabus as follows:

"Although, in an action against a railroad company to recover damages for an injury alleged to have been done through the negligence of its employee in the performance of his duty connected

with the running of its trains, the evidence on behalf of the plaintiff may not have been clear on several essential points, leaving it somewhat doubtful whether the plaintiff was injured by a person on board of the defendant's train or the train of another company which used the same track, or whether the injury was done by an employee acting within the scope of his duty, or was the result of his personal wrong while acting outside of his authority, or even whether the plaintiff had a right to be where she was when the damage was done to her; yet, as inferences favorable to her might have been drawn by the jury from the evidence, if left unexplained or uncontroverted on all of those points, and as negligence in the servants of the company was a question for the jury, a nonsuit should not have been awarded."

The FRAZER case, *supra*, was an action by husband and wife for injuries to wife while standing near defendant's track by being hit by a heavy piece of wood which "dropped, fell and was thrown" from the train upon her by carelessness and negligence of defendant's servants.

#### NOTES OF GEORGIA CASES ARISING OUT OF INJURIES TO EMPLOYEES IN SERVICE OF RAILROAD COMPANIES.

##### 1. BAGGAGEMASTERS INJURED.

- a. *Jumping from train.*
- b. *Object near track.*

##### 2. BRAKEMEN INJURED.

- a. *Car overturned.*
- b. *Collision.*
- c. *Contact with bridge.*
- d. *Coupling and uncoupling cars.*
- e. *Defective brake.*
- f. *Deraiment.*
- g. *Falling from ladder of car.*

##### 3. CAR INSPECTORS INJURED.

##### 4. CAR CLEANERS INJURED.

##### 5. CAR COUPLERS INJURED.

- a. *Coupling and uncoupling cars.*
- b. *Defective appliance.*

##### 6. CONDUCTORS INJURED.

##### 7. COUPLING AND UNCOUPLING CARS — EMPLOYEES INJURED.

- a. *Coupling and uncoupling cars.*
- b. *Defective appliance.*

##### 8. ENGINEERS INJURED.

- a. *Collision.*
- b. *Deraiment.*
- c. *Object near track.*
- d. *Miscellaneous.*

**9. FIREMEN INJURED.**

- a. *Boarding engine.*
- b. *Collision.*
- c. *Defective appliance.*
- d. *Derailment.*
- e. *Jumping from engine.*
- f. *Object near track.*

**10. FLAGMEN INJURED.****11. MACHINISTS INJURED.**

- a. *Flying object.*
- b. *Machinery.*

**12. SECTION-HANDS INJURED.****13. SWITCHMEN INJURED — VARIOUS CAUSES.****14. TRACK-HANDS INJURED.**

- a. *Flying object.*
- b. *Run over by cars.*
- c. *Track-raisers injured.*
- d. *Miscellaneous.*

**15. TRAIN-HANDS INJURED — VARIOUS CAUSES.****16. WATCHMEN INJURED.**

- a. *Struck by trains.*
- b. *Miscellaneous.*

**17. MISCELLANEOUS CASES — INJURIES TO RAILROAD EMPLOYEES.****1. Bagagemasters injured.**

- a. *Baggagemaster jumping from train to avoid collision.*

In GEORGIA R. R. & BANKING CO. v. RHODES, 56 Ga. 645 (1876), baggagemaster injured by jumping from train to avoid impending collision, his ankle being injured and crippled for life, judgment for plaintiff for \$6,000 in the DeKalb Superior Court was affirmed.

- b. *Baggagemaster struck by object near track.*

In ATLANTA & CHARLOTTE AIR-LINE R'Y v. WOODRUFF, 66 Ga. 707 (1881), baggage-master looking out of side door of baggage car to see if hot wheels endangered safety of train, struck by projecting spout or tank near track, judgment overruling demurrer to complaint was affirmed.

**2. Brakeman injured.**

- a. *Car overturned.*

In LAWHORN v. THE MILLEN & SOUTHERN R'Y CO., 97 Ga. 742 (1896), brakeman and train-hand injured by the overturning of a freight car, on the top and at the brake of which he was standing, while the train was running around a sharp curve in the track, judgment of nonsuit in the Emanuel Superior Court was reversed, it being held that the question whether the employee assumed the risk of employment in a case where the speed was suddenly increased to a dangerous rate over a particularly defective track, was for the jury.

*b. Collision.*

In *CENTRAL R. R. & BANKING CO. v. PASSMORE*, 90 Ga. 203 (August, 1892), brakeman injured in collision, judgment for plaintiff for \$1,250 in the City Court of Macon was affirmed. It was held, as per official syllabus, that "A railway company permitting by contract or otherwise another railway company to use a section of its main line, not at a terminal point but to reach such point, is liable to one of its own employees for a personal injury resulting to him from the negligence of the latter company in running its train over and upon the section used in common by both companies, it not appearing that the negligent company had any legislative authority to adopt and use as its own any part of the main line of the other company. In such case both companies should be considered as using the franchise of the one owning the line, and the principle of *Macon & Augusta R. R. Co. v. Mayes*, 49 Ga. 355, applies."

*c. Contact with bridge.*

In *SAVANNAH, FLORIDA & WESTERN R'Y CO. v. DAY*, 91 Ga. 676 (July, 1893), plaintiff's husband, a brakeman on defendant's freight train, fatally injured by coming in contact with low bridge, judgment for plaintiff for \$1,560 in the Wayne Superior Court was affirmed.

See also *Hendricks v. Western & Atlantic R. R. Co.*, 52 Ga. 467 (1874), brakeman on top of car killed by contact with bridge. New trial granted to defendant affirmed.

*d. Coupling and uncoupling cars.*

In *NORTHEASTERN R. R. CO. v. BARNETT*, 89 Ga. 399 (1892), judgment in the Clarke Superior Court, on verdict rendered for \$2,500 for plaintiff, was affirmed, it being held that the verdict was warranted by the evidence, and was not contrary to law. Barnett sued the Northeastern Railroad Company for damages for personal injuries. The defendant pleaded not guilty; that at the time of the alleged injury plaintiff was not employed by it, but by the Richmond & Danville R. R. Co., its lessee; and that plaintiff and the latter company did, on June 18, 1887, in consideration of \$143 paid to plaintiff by the Richmond & Danville R. R. Co., release defendant from all liability to plaintiff on account of the injury, and relinquished any right of action plaintiff then had or might have against defendant. The verdict rendered at the first trial was set aside and a new trial granted. On the second trial a nonsuit was awarded; plaintiff excepted, and judgment was reversed. (See 87 Ga. 199.) Upon the last trial there was a verdict for plaintiff for \$2,500. Defendant moved for a new trial, upon the grounds that the verdict was contrary to law and evidence. The motion was overruled and defendant excepted. Plaintiff was a train-hand and baggage-master on the Northeastern Railroad, part of his duties being to couple and uncouple cars, and while attempting to uncouple a car from the tender of an engine in the railroad yard, was injured by his hand and wrist being crushed between the bumpers. See also former decision in the *BARNETT* case, 87 Ga. 199, reported in this volume, p. 220, *post*.

In *WESTERN & ATLANTIC R. R. CO. v. VANDIVER*, 85 Ga. 470 (May, 1890), brakeman on freight-train injured while between cars making a coupling, the injury being caused by alleged negligence of other servants, judgment for plaintiff in the Whitfield Superior Court for \$750 was reversed, the official syllabus stating the case as follows:

" In a suit against a railroad company by one of its servants for injuries sustained by alleged negligence of others of its servants in the performance of an act with which the plaintiff was connected at the time of the injury, the presumption of negligence was not against the company before the plaintiff proved that he was without fault.

Section 3033 of the Code makes railroad companies liable for damages done *by, not to, any person in their employment.*"

In LOUISVILLE & NASHVILLE R. R. CO. v. CHAFFIN, ADM'R, 84 Ga. 519 (October, 1889), brakeman while going between cars to couple them, run over and killed, track being defective, judgment for plaintiff for \$5,000 in the City Court of Atlanta, *reversed*. The accident took place in Alabama.

In WESTERN & ATLANTIC R. R. CO. v. STRONG, 52 Ga. 461 (1874), action for homicide of plaintiff's husband, a brakeman in the defendant's employ, caused by improper coupling whereby he was thrown from the cars and run over, judgment for plaintiff for \$500 in the Fulton Superior Court was *reversed*. The question turned on the right of wife to maintain action, it being held that the wife had no right to sue alone. Citing and following rule in Selma, etc., R. Co. v. Lacy, 49 Ga. 106. On the question of a contract between railroad and employee, the court followed Western & Atlantic R. R. v. Bishop, 50 Ga. 465, where it was held that the contract between an employee and the railroad, regulating the relative rights and duties of each, in so far as it did not condone any criminal act, was binding on both parties.

The case of HENDRICKS v. WESTERN & ATLANTIC R. R. CO., 52 Ga. 467 (1874), train-hand killed by being knocked off the top of the train while passing under a bridge, was decided at the same term and ruled as in Western & Atlantic R. R. Co. v. Strong, 52 Ga. 461 (preceding paragraph). In the Hendricks case there was a verdict for plaintiff for \$3,346 in the Fulton Superior Court, which, however, was reversed and a new trial granted to defendant, from which judgment plaintiff appealed. *Judgment affirmed.*

*e. Defective brake.*

In EAST TENNESSEE, VIRGINIA & GEORGIA R'Y CO. v. SMITH, 90 Ga. 558 (November, 1892), employee acting as flagman or brakeman injured while putting on a brake, the brake-wheel flying off, throwing him to the ground and his left leg cut off by train, judgment for plaintiff for \$5,000 in the City Court of Atlanta was *affirmed*.

*f. Derailment.*

In HOVIS, ADM'X v. RICHMOND & DANVILLE R. R. CO., 91 Ga. 36 (October, 1892), brakeman on defendant's freight train thrown from car and killed in derailment of train while running on defendant's track in South Carolina, it was held that: "The case being brought under the law of South Carolina, where the common law rule prevails as to the liability of a master for injuries caused to his servant by the negligence of a fellow servant, the court, under the facts alleged in the declaration, did not err in sustaining the demurrer on the ground that no cause of action was set out therein." Judgment of City Court of Atlanta *affirmed*.

*g. Falling from car.*

In GEORGIA SOUTHERN R. R. CO. v. NEEL, 68 Ga. 609 (1882), brakeman, in

descending ladder on car, thrown to ground, his ankle and foot being injured, judgment for plaintiff for \$1,000 in the Floyd Superior Court was *affirmed*.

#### 3. Car inspectors injured.

In RICHMOND & DANVILLE R. R. CO. v. GARNER, 91 Ga. 27 (October, 1892), judgment for \$700 for plaintiff in the City court of Atlanta was affirmed. Paragraph 3 of the official syllabus states the case as follows:

"The evidence showing that the plaintiff, an employee of a railroad company, in the course of his duty, in the daytime, after examining a coal car and testing the security of its position, had safely ascended it, and that while he was engaged in doing some necessary work in the car the ladder, without his knowledge, was removed by another employee of the company, who in a short time replaced it against the car apparently in the same position, and that upon the plaintiff's attempting to descend, without re-examining the ladder or again testing the safety of its position, it slipped from under him, and he fell and was injured, it was a question of fact for the determination of the jury as to whether or not the plaintiff was guilty of any negligence contributing to the injury. This question having, under proper instructions from the court, been decided by the jury in his favor, the verdict will not be disturbed."

In SAVANNAH, FLORIDA & WESTERN R'Y CO. v. HOWARD, 91 Ga. 99 (November, 1892), car-inspector injured by his hand being crushed while examining car, judgment in the Chatham Superior Court for \$2,416.50 for plaintiff was *affirmed*.

See former appeal in the HOWARD case, 84 Ga. 711, where judgment granting defendant new trial was affirmed.

In HOWARD v. SAVANNAH, FLORIDA & WESTERN R'Y CO., 84 Ga. 711 (March, 1890), car-inspector injured by his hand being crushed while examining and feeling the wheel of a coach, judgment in the Chatham Superior Court granting new trial to defendant was *affirmed*.

See subsequent decision in the HOWARD case, 91 Ga. 99, *supta*.

#### 4. Car cleaners injured.

In SAVANNAH, FLORIDA & WESTERN R'Y CO. v. DU BOSE, 93 Ga. 247 (January, 1894), the facts were as follows: The plaintiff alleged that while in the employment of the railway company he was ordered to clean out the boiler of an engine; that the company failed to furnish him with safe and suitable machinery and instrumentalities of labor, for a certain cock on the engine was so defective that the plug thereto blew out without fault on his part, and while he was performing his duty, causing him to be severely scalded; and that the defect was unknown to him and known to defendant, and could have been discovered and remedied by it. At the close of his evidence a nonsuit was moved for, on the ground that he failed to show that he was without fault, or that the company did not exercise all ordinary and reasonable care in furnishing him with safe and suitable appliances for his work. The motion was overruled. Plaintiff obtained a verdict for \$1,000, and defendant moved for a new trial on the grounds that the verdict was contrary to law and evidence, decidedly and strongly against the weight of evidence, etc. This motion was also overruled in the City Court of Savannah. *Judgment affirmed*.

In CAREY v. EAST TENNESSEE, VIRGINIA & GEORGIA R'Y CO., 95 Ga. 547 (1895), it was held error to grant nonsuit where the plaintiff's intestate, a "cleaner" or

"wiper" in defendants employ, his duties being to wipe off trucks, clean cars, etc., while crossing the tracks in defendant's yard at night was run over and killed by a long "circus car" which was being pushed by a switch engine, as the question of negligence should have been submitted to the jury, and judgment of nonsuit was reversed.

In *GEORGIA PACIFIC R'Y Co. v. FREEMAN*, 83 Ga. 583 (1889), where plaintiff was employed to clean defendant's cars and was injured by being caught between the ends of one stationary and another shoved back by the engine to be coupled, his injuries being permanent, judgment for plaintiff for \$2,500, in the City Court of Atlanta, was affirmed. It was held that where the injuries were permanent a charge that there is no fixed rule of estimating damages of this sort was not erroneous.

##### 5. Car couplers injured.

###### a. Coupling and uncoupling cars.

In *ESLINGER v. WESTERN & ATLANTIC R. R. Co.*, 99 Ga. 327 (1896), car-coupler killed while in performance of his duties, judgment of nonsuit in the Whitfield Superior Court was affirmed, it being held that there was no stronger evidence to support allegation of defendant's negligence than on previous trial, the decision of which in favor of plaintiff was reversed by the Supreme Court. See the *ESLINGER* case, 95 Ga. 734, in which latter report the plaintiff's name is spelled ESSLINGER.

In *CENTRAL R. R. & BANKING CO. v. MALTSEY*, 90 Ga. 630 (December, 1892), car-coupler's hand injured while coupling cars, judgment for plaintiff in the Bibb Superior Court was reversed, paragraph 3 of the official syllabus stating the case as follows: "The evidence being that the plaintiff was furnished with a coupling stick to be used till he learned how to couple without it, and that his injury was received after he had learned to couple without a stick and had on many occasions done so, some of the instances being in the presence of his superior officers, who made no objection, the court properly denied a request by the defendant to charge the jury that if the plaintiff, in undertaking the service, was furnished with a coupling stick and directed to use it in coupling, but did not use it at the time of the injury, and attempted to make the coupling with his hand instead of the stick, and was hurt in making such attempt, he could not recover."

In *REBB v. EAST TENNESSEE, VIRGINIA & GEORGIA R'Y Co.*, 87 Ga. 631 (1891), minor employee, a car-coupler, injured while coupling cars, it was held that "Though attempting to couple cars when the engine is running at a speed of fifteen miles an hour is apparently not only dangerous but reckless, yet if it be true in the experience of engineers and railroad men that it is safe provided the engine is properly managed, and if the failure in question resulted solely from the fault of the engineer in manipulating the engine, the high speed will be no obstacle to a recovery by the car-coupler for a personal injury sustained by him in making the attempt. Though to non-experts its truth would seem in a high degree improbable, if not impossible, yet there being direct and positive evidence tending to support the theory of safety, the court erred in granting a nonsuit."

In *BARNETT v. NORTHEASTERN R. R. Co.*, 87 Ga. 199 (May, 1891), car-coupler and train-hand injured while between flat car and engine, it being his duty to uncouple cars, judgment of nonsuit was reversed, as the question of negligence

and the evidence as to who was plaintiff's employer was for jury. The accident happened on the track of the Richmond and Danville Railroad, but there was evidence that the superintendent from whom plaintiff sought the position was the superintendent of both the Northeastern and the Richmond and Danville railroads.

See also, subsequent decision in the *BARNETT* case, 89 Ga. 399, 14 Am. Neg. Cas. 217, *ante*.

In *SAVANNAH, FLORIDA & WESTERN R'Y v. BARBER*, 71 Ga. 644 (1883), car-coupler's hand crushed and fingers injured while attending to his duties, order granting plaintiff a new trial on verdict rendered for the railway company in the Chatham Superior Court was *affirmed*. The trial court erred in charging that "plaintiff must be blameless, without qualification. The law is, blameless about the business which caused the injury. If negligent or careless, it must have been contributory to his hurt, to prevent recovery. *Central R. R. v. Mitchell*, 63 Ga. 173, since affirmed by an unanimous court." The *Mitchell* case seems to have been adopted and approved by the court in *Central R. R. v. De Bray*, 71 Ga. 406, 14 Am. Neg. Cas. 96, *ante*.

#### *b. Defective appliance.*

In *O'SHIELDS v. GEORGIA PACIFIC R'Y CO.*, 83 Ga. 621 (1889), plaintiff, a car-coupler, injured in the State of Alabama by reason of alleged defective draw-head, judgment of the Fulton Superior Court dismissing action was *reversed*, it being held that "where a right of action for a tort is given by a statute of another State, and no period of limitation is prescribed otherwise than by the general law of limitation prevailing in that State, the *lex fori*, not the *lex loci*, applies on the subject of limitation."

#### **6. Conductors injured.**

In *GEORGIA, CAROLINA & NORTHERN R'Y CO. v. HALLMAN*, 97 Ga. 317 (1895), judgment for plaintiff in the Gwinnett Superior Court was *reversed*, it being held (per LUMPKIN, J.), that "there being clear and uncontradicted evidence that the plaintiff's husband, an employee of the railway company, was himself guilty of negligence in bringing about and contributing to the casualty by which his death was occasioned, she was not entitled to recover, and the court erred in denying a new trial." Plaintiff's intestate was the conductor of a construction train, and while standing on the top of the car nearest to the engine, was thrown therefrom by the car being derailed owing to the fall of certain apparatus, and the intestate was run over and killed.

In *KANE v. SAVANNAH, FLORIDA & WESTERN R'Y CO.*, 85 Ga. 858 (March, 1890), it appeared that plaintiff, a conductor of defendant's freight train, had his first and second right-hand fingers mashed by a coupling-pin, while trying to uncouple two of the cars in this train. He recovered a verdict for \$3,000 in the Chatham Superior Court, but defendant's motion for new trial was granted, and plaintiff excepted. Held, on appeal, that there was no abuse of discretion in granting a new trial, there being newly discovered testimony on behalf of defendant.

#### **7. Coupling and uncoupling cars — Employees injured.**

##### *a. Coupling and uncoupling cars.*

*GEORGIA R. R. & BANKING CO. v. BROOKS*, 97 Ga. 314 (1895), was an action by a train-hand for damages for injuries sustained by his arm being caught

between the dead blocks of two freight cars which he was endeavoring to couple by order of the conductor of the train; the negligence charged being carelessly running the train back to the standing car with too great speed. Judgment for plaintiff for \$1,600 in the Oglethorpe Superior Court was affirmed.

In KENDRICK v. CENTRAL R. R. & BANKING CO., 89 Ga. 782 (1892), judgment of nonsuit in the Muscogee Superior Court was affirmed. The action was for the homicide of plaintiff's intestate, who was a switchman in defendant's employ, and who was killed while uncoupling cars. The official syllabus states the decision as follows:

"1. The action being for the homicide of an employee of the company, and the evidence not showing affirmatively whether the employee was free from negligence or not, and no negligence on the part of the company adequate to have caused the homicide under the circumstances being shown, the most reasonable and probable cause of the disaster being an accident to the employee by which his life became suddenly exposed to a danger incident to his employment, there was no error in granting a nonsuit.

"2. Whether the employee was an experienced or inexperienced person was immaterial under the facts in evidence."

In RICHMOND & DANVILLE R. R. CO. v. WILLIAMS, 88 Ga. 16 (October, 1891), train-hand ordered by conductor to couple some cars to an engine, injured while between cars, his hand being caught owing to moving of cars, judgment for plaintiff for \$2,350 in the City Court of Atlanta was affirmed.

In RICHMOND & DANVILLE R. R. CO. v. WRIGHT, 88 Ga. 19 (October, 1891), employee's hand injured while coupling cars under orders of conductor, judgment for plaintiff for \$475 in the City Court of Atlanta was affirmed.

In MAYFIELD v. SAVANNAH, GRIFFIN & NORTH ALABAMA R. R. CO., 87 Ga. 374 (1891), employee injured coupling car, judgment of nonsuit affirmed.

In GEORGIA PACIFIC R'Y CO. v. RIGDEN, 85 Ga. 867 (April, 1890), train-hand injured while attempting to couple cars, two of his fingers being mashed, judgment for plaintiff in the City Court of Atlanta for \$550 was affirmed.

In GEORGIA PACIFIC R'y CO. v. WEAVER, 85 Ga. 869 (April, 1890), employee's arm injured while between cars for the purpose of uncoupling, judgment for plaintiff for \$750 in the City Court of Atlanta was affirmed.

In GEORGIA PACIFIC R'y CO. v. ELLIOTT, 85 Ga. 183 (April, 1890), it was held that discretion of trial court (Fulton Superior Court) in refusing a new trial on conflicting evidence was not abused, and verdict for \$500 damages for injury to hand of defendant's flagman, while between cars to uncouple them, was not excessive. Judgment affirmed.

In CENTRAL R. R. & BANKING CO. v. RYLES, 84 Ga. 420 (February, 1890), train-hand coupling cars, his hand and fingers being injured, judgment for plaintiff in the Bibb Superior Court for \$5,000 was affirmed.

In PRESTON v. CENTRAL R. R. & BANKING CO., 84 Ga. 588 (March, 1889), switchman and car-coupler injured by his foot being run over by wheel of car, judgment sustaining demurrer to declaration was reversed.

In CENTRAL R. R. & BANKING CO. v. NEIGHBORS, 83 Ga. 444 (1889), railroad employee directed by yard conductor to make a coupling injured while coupling cars, judgment for plaintiff in the City Court of Atlanta was affirmed. Plaintiff's hand was injured owing to negligence of engineer in moving train.

In SPARKS v. EAST TENNESSEE, VIRGINIA & GEORGIA R'y CO., 82 Ga. 157

(December, 1888), judgment for defendant in the Floyd Superior Court was affirmed, in an action for personal injuries sustained by plaintiff whilst coupling cars, taking orders from the brakeman in lieu of paying fare as a passenger. He was a mere volunteer, and not in the service of the company.

In *CENTRAL R. R. & BANKING CO. v. NASH*, 81 Ga. 580 (1888), car-coupler fatally injured by foot catching in a guard-rail and run over by car, judgment for plaintiff, the widow of the deceased employee, for \$5,304 on verdict rendered in the City Court of Atlanta, was affirmed. It was held that mortuary and annuity tables were properly admitted as evidence on measure of damages.

In *GEORGIA RAILROAD v. BRYANS*, 77 Ga. 429 (1886), judgment for plaintiff for \$600 in the Clarke Superior Court was affirmed. Bryans brought suit for damages for the crushing of his right thumb while engaged in coupling cars for the company, alleging negligence in that the bumpers of the two cars were of uneven height; that the coupling-link was too short and of improper shape; that the engineer backed the engine with too much speed.

In *CENTRAL RAILROAD v. FREEMAN*, 66 Ga. 170 (1880), employee's hand injured while coupling cars, judgment for plaintiff in the Bibb Superior Court was affirmed.

In *ATLANTA & WEST POINT R. R. CO. v. JOHNSON*, 66 Ga. 259 (1881), train-hand ordered by conductor to couple a box car to a flat car injured by his hand being caught between the bumpers of the cars, judgment for plaintiff in the City Court of Atlanta for \$5,250 was affirmed.

In *MARSH v. SOUTH CAROLINA R. R. Co.*, 56 Ga. 274 (1876), employee run over and killed by train while uncoupling cars, judgment of nonsuit in the Richmond Superior Court was affirmed.

#### *b. Defective appliance.*

In *OUSLEY v. CENTRAL R. R. & BANKING CO.*, 86 Ga. 538 (1891), employee injured while coupling cars, judgment of nonsuit in the Wilkinson Superior Court was reversed, the official syllabus stating the case as follows:

" 1. Where the evidence shows that a draw-bar supplied by a railway company to be used in coupling cars was used on two occasions, working well on the first, but failing to work on the second, though twice tried in a proper manner, a jury might, in the absence of any explanation from the company, infer that the implement was defective.

" 2. A second effort on the same occasion to couple cars with a draw-bar, the first having failed because the bar had been fixed in its position and not readily movable, is not necessarily improper or inexcusable, where the bar had been shaken loose after the first effort and before the second was made, although the second failed for the same reason as the first and the plaintiff was thereby injured."

In *BRUNSWICK & WESTERN R'Y CO. v. CLEM*, 80 Ga. 535 (1888), train-hand injured by his arm being crushed while coupling a car to an engine, caused by defective spring of one of the bumpers, judgment for plaintiff in the Ware Superior Court for \$1,467 was affirmed.

In *WESTERN & ATLANTIC R. R. CO. v. BISHOP*, 50 Ga. 465 (July Term, 1873), appeal from judgment for plaintiff for \$5,000 in the Catoosa Superior Court, in action for injuries sustained while in discharge of duties as train-hand, caused, as alleged, by defective machinery used for coupling cars, judgment was

reversed for erroneous instructions. At the time of employment plaintiff signed a special contract, assuming all risks incident to his employment, releasing the company from liability for accidents, etc., and from negligent acts of himself or other persons in defendant's employment. Held, that such a contract, so far as it did not waive any criminal neglect, was a legal contract and binding upon the employee.

### 8. Engineers injured.

#### a. Collision.

In *DEVINE v. SAVANNAH, FLORIDA AND WESTERN R'y Co.*, 84 Ga. 541 (1892), judgment of nonsuit was affirmed it being held that: "Where a locomotive engineer is warned by a signal of danger ahead not to proceed with his train, and immediately thereafter another signal is given which indicates that he might proceed with safety, but both signals are continuously displayed together, so as to leave it in doubt which signal should be regarded, it is negligence for the engineer to go on with his train, and if he does so and a collision ensues in which he loses his life, his widow cannot recover from the company for his homicide thus occasioned; the law being that, if an employee is guilty of any negligence contributing to an injury to himself, he cannot recover if the injury does not result in his death, or if it does so result, that no right of action accrues to his widow."

In *CENTRAL R. R. AND BANKING CO. v. BRUNSWICK AND WESTERN R. R. CO.*, 27 Ga. 386 (1891), engineer of Central Railroad and also engine injured in collision with train of the Brunswick, etc., R. R. Co., it was held that: "Where a railroad company and its employee are both injured by the same negligence of another railroad company, the first company has no right, in an action for its own damages against a second, to sue also for the use of its employee to recover the damages sustained by him in excess of those already paid to him by the plaintiff in the action." It was also held that: "Where a collision between the plaintiff's train and the defendant's train occurred on a track used by them in common, whilst the plaintiff or its agents was engaged in the violation of a valid city ordinance limiting the rate of speed in the running of trains in the city, and the jury believed from the evidence that the collision would not have occurred but for such violation, the plaintiff could not recover, it not appearing that the defendant could have avoided the consequences of the plaintiff's negligence after becoming aware of the same."

In *GEORGIA PACIFIC R'y Co. v. BOWERS*, 86 Ga. 22 (1890), engineer in employ of defendant company injured in collision, judgment for plaintiff was affirmed, it being held as follows:

"1. Where the direct issue between the parties in an action for damages against a railroad company was as to whether, on the approach of a train to a station, the company's agent exhibited only a white light, indicating that the road was clear and that the train might proceed without encountering collision or obstruction, or whether the agent also exhibited a green light under the white one, indicating that the train should proceed with caution and that there was another train on the road between the approaching train and the next station, and both sets of witnesses testified with equal positiveness, the question of positive and negative testimony was not involved, and a charge on such question was, therefore, not required.

"2. If the theory of the plaintiff is correct, the facts to sustain which the jury

found to be proved, he was not chargeable with negligence in avoiding the collision which caused the injury, from the fact that in approaching a station three miles from the place of the collision, his train (he being engineer) was running at a rate of speed so high that the train was not then under his control; no accident having occurred there, and it not appearing that the collision occurred by reason of the speed at which the train was then running.

"3. The plaintiff's injuries being grave and permanent, damages to the amount of \$2,266.66 do not appear to be excessive."

In SAVANNAH, FLORIDA & WESTERN R'Y Co. v. FOLKS, 76 Ga. 527 (March Term, 1886), appeal from judgment for plaintiff for \$7,000 in the Pierce Superior Court, in an action for homicide of plaintiff's husband, an engineer in defendant's employ, killed in collision, judgment was reversed. The syllabus to the official report states the case as follows:

"Where the undisputed evidence showed that an engineer of a railroad company violated its rules furnished for his government in respect to passing switches and turnouts, and in respect to the speed at which trains should be run, and the precautions to be used by engineers to prevent collisions, and that a collision was occasioned in whole, or at least a large part, from his negligence in this regard, and that such collision caused his death, a recovery by his widow against the railroad for his homicide was contrary to law and unsupported by the evidence, whether or not there was also negligence on the part of the company's employees on the other train with which the collision occurred. Such violation of rules appearing from the evidence for the plaintiff, *seems* that a nonsuit should have been granted." The court cited and followed Rowland v. Cannon, 35 Ga. 105, 107, 108; East Tenn., Va. & Ga. R. Co. v. Duggan, 51 Ga. 212; Ga. R. R. v. McDade, 59 Ga. 73; Central R. R. v. Mitchell, 63 Ga. 181, 182, which cases are reported with the Georgia cases in this volume (vol. 14) of AM. NEG. CAS.

#### *4. Derailment.*

In DUNLAP v. RICHMOND & DANVILLE R. R. Co., 81 Ga. 136 (1888), engineer in defendant's employment ordered by defendant to run an engine over the Northwestern Railroad, injured by the engine being derailed owing to defective track, judgment sustaining demurrer to the complaint in the City Court of Atlanta was affirmed. It was held that "a railroad company sending its locomotive engineer (employed by the month) with one of its engines to haul temporarily for another company the trains of the latter over the line of such latter company, is not responsible to the engineer for the bad condition of the track, nor for the want of adaptation of the engine to the track, it not being alleged that the employer company knew of such bad condition or want of adaptation, and concealed its information."

In GEORGIA R. R. & BANKING Co. v. OAKS, 52 Ga. 410 (1874), action for damages for homicide of plaintiff's husband, an engineer in defendant's employ, caused by defective switch on the railroad whereby the engine and train were derailed, judgment for \$6,583 for plaintiff in the Greene Superior Court was reversed for erroneous charge to jury, refusal to charge as requested by defendant, and admission of incompetent evidence.

#### *4. Object near track.*

In EAST TENNESSEE, VIRGINIA AND GEORGIA R'Y Co. v. HEAD, 92 Ga. 723 (1893), judgment for plaintiff was reversed, the syllabus by the court being as VOL. XIV — 15

follows: "It appearing that if the railway company negligently erected the danger signal post by placing it too near the track of the railway, this fact must have been well known by the deceased engineer, the plaintiff's husband, and it also appearing by uncontradicted evidence that he unnecessarily left his place upon the locomotive and exposed himself to danger for the purpose of getting a view of a hot journal, when he could have done so safely without leaving that place, his death was caused, in part at least, by his own negligence, and his widow was not entitled to a recovery from the company."

*d. Miscellaneous.*

In *CENTRAL RAILROAD v. RICHARDS*, 62 Ga. 306 (1879), engineer on freight train thrown from engine while running the train, judgment for plaintiff for \$3,000 in the Henry Superior Court was *affirmed*.

In *JOHNSTON v. RICHMOND AND DANVILLE R. R. Co.*, 95 Ga. 685 (1895), judgment for defendant company was *reversed*, the court holding that: "In an action by a locomotive engineer against a railroad company of which he was an employee, for personal injuries received by him while running a locomotive, it was error to charge that in order to entitle the plaintiff to a recovery it was necessary for him to show affirmatively both negligence on the company's part and the absence of negligence on his part. If he showed that he was not negligent, the presumption of negligence was raised by law against the company. If he showed that the company was negligent, it then became incumbent on the company as matter of defense to show that the plaintiff was negligent."

**9. Firemen injured.**

*a. Boarding engine.*

In *ROUL v. EAST TENNESSEE, VIRGINIA & GEORGIA R'Y CO.*, 85 Ga. 197 (April, 1890), fireman injured in trying to board moving locomotive, judgment of non-suit in the Fulton Superior Court was *affirmed*. It was held that: "If a servant of a railroad company obeyed the order of a superior servant to mount a locomotive running at from six to twelve miles per hour, the company is not liable for the injury thereby sustained."

*b. Collision.*

In *CHATTANOOGA, ROME & COLUMBUS R. R. CO. v. OWEN*, and *vice versa*, 90 Ga. 265 (August, 1892), fireman on defendant's locomotive injured in collision, his train running into and telescoping the rear-end of a local freight train, judgment in the Chattanooga Superior Court was *reversed*. Owen sued the railway company for damages for personal injuries and obtained a verdict for \$17,500. Defendant moved for a new trial, motion was overruled, and exceptions were taken to that ruling, and to the overruling of a demurrer to the declaration. Plaintiff excepted to overruling of his motion to dismiss the motion for a new trial. It was held that "the court did not err in overruling the motion to dismiss the motion for a new trial. The declaration set forth a cause of action, and there was no error in overruling the demurrer thereto." Judgment reversed for misleading instruction on the measure of damages, and new trial granted.

In *WESTERN & ATLANTIC R. R. CO. v. LEWIS*, 84 Ga. 211 (January, 1890), fireman injured in collision caused by misplaced switch, his hip being seriously

injured, judgment for \$9,000 for plaintiff in the Barton Superior Court was affirmed.

In *CARROLL v. EAST TENNESSEE, VIRGINIA & GEORGIA R. R. CO., and vice versa*, 82 Ga. 452 (September, 1889), fireman injured in collision, it being alleged that his engineer was asleep at the time, appeals by defendant from verdict for plaintiff for \$12,000 in the Bibb Superior Court, and exceptions by plaintiff to trial court sustaining certain points in defendant's motion for new trial, and a cross-bill of exceptions was taken to refusal to sustain the other grounds of defendant's motion, the judgment in the main case was affirmed, and on the cross-bill of exceptions reversed. Injuries — amputation of leg.

In *MACON & AUGUSTA R. R. CO. v. MAYES*, 49 Ga. 355 (July Term, 1873), it was held that: "Where a railroad company permits other companies or persons to exercise the franchise of running cars drawn by steam over its road, the company owning the road, and to which the law has entrusted the franchise, is liable for any injury done, as though the company owning the road were itself running the cars." It appeared that plaintiff was employed in laying the track of defendant company and that the superintendent of the construction company ordered plaintiff to serve in the capacity of fireman on their engine in the absence of the regular fireman. While so acting there was a collision with a train and plaintiff was so injured that his leg had to be amputated. A verdict for plaintiff was rendered in the Early Superior Court for \$3,500. On appeal judgment was affirmed.

c. *Defective appliance.*

In *PORT ROYAL & AUGUSTA R'Y CO. v. TOMPKINS*, 83 Ga. 759 (1889), it was held that "an allegation that the railroad was negligent in not having a key placed in the bolt which fastened the tender to the engine, in consequence of which the bolt came out, the engine and tender separated, and the fireman was thrown between them to the ground and injured, is not supported by proof that the bolt was not long enough to go through so as to be keyed and thereby prevented from coming out, and that the train was stopped and the engineer and fireman attempted to fasten the bolt, but it was so short that this could not be done. Whether on a proper allegation there could be a recovery is not decided." Judgment for plaintiff in the Richmond Superior Court reversed.

d. *Derailment.*

In *SAVANNAH & WESTERN R. R. CO. v. PHILLIPS*, and vice versa, 90 Ga. 829 (March, 1893), judgment for plaintiff in the Chattahoochee Superior Court was affirmed. Plaintiff was a fireman on an engine used in construction of extension of defendant's track and was injured in derailment caused by defective engine and track. It was held, among other points in the official syllabus, that: "Where a railroad company furnishes to a contractor engaged in constructing an extension of the company's railroad an engine and train, upon which a fireman already in the service of the company is, by it, ordered to work, the company is liable for personal injuries to him, caused while obeying this order, by defects in the engine attributable to the company's negligence, although the track of the extension in progress is in possession of the contractor, and the operation and movements of the train thereon are under the latter's exclusive control."

*e. Jumping from engine.*

In **SAVANNAH, FLORIDA & WESTERN R'Y CO. v. FALVEY**, 93 Ga. 244 (January, 1894), locomotive fireman jumping from engine to avoid impending danger, judgment for plaintiff for \$2,370 in the City Court of Savannah was *affirmed*, the injuries sustained being to hip, chest, back, and internal injuries, it being held that "although the evidence would well have warranted a finding for the defendant, it also warranted the verdict in favor of the plaintiff, the weighing and balancing of the whole being a matter for the jury."

*f. Object near track.*

In **ATLANTA & WEST POINT R. R. CO. v. WEBB**, 61 Ga. 586 (1878), fireman killed on train by striking his head against water tank, judgment for plaintiff for \$3,141.33 in the Fulton Superior Court was *reversed*.

**10. Flagmen injured.**

In **GEORGIA PACIFIC R'Y CO. v. HUDSON**, 89 Ga. 558 (1892), judgment for plaintiff for \$5,000 in the City Court of Atlanta was *affirmed*, it being held that the evidence warranted the verdict and damages were not excessive. Plaintiff was about twenty-one years of age when the injury happened and was earning about \$45 a month. His fall from the car was fifty-two feet, the train being on a trestle. He was unconscious for several days, was confined to bed for over a month, walked with crutches for a long time, and suffered great pain in his back and hip. His hearing and eyesight were impaired; he became generally debilitated, and his nervous condition was rendered bad; his capacity to labor was reduced more than half; and the effects of his injuries were likely to be permanent.

The former decision in the **HUDSON** case, 85 Ga. 203, which reversed a nonsuit, states the facts and the main point decided is there set forth in the head-note as follows: Whether or not a train flagman, who was injured while giving signals to the engineer, was in the line of his duty or was assuming to act for the conductor, and whether or not he was guilty of contributory negligence, were questions for the jury.

In **HUDSON v. GEORGIA PACIFIC R'y Co.**, 85 Ga. 203 (April, 1890), flagman, while giving signals to engineer, leaning out of door of cab and thrown therefrom by sudden jerk of train, judgment of nonsuit in the City Court of Atlanta was *reversed*, it being held that "whether or not a train flagman who was injured while giving signals to the engineer, was in the line of his duty or was assuming to act for the conductor, and whether or not he was guilty of contributory negligence, were questions for the jury."

See subsequent decision in the **HUNSON** case, 89 Ga. 558, *supra*.

In **MILLS v. EAST TENNESSEE, VIRGINIA & GEORGIA R'Y CO.**, 87 Ga. 102 (March, 1891), flagman on freight train killed in collision in night-time, caused by running of engine of passenger train into rear-end of freight train, his duties requiring him to be "on or about the rear-end of the freight train," it was held error to grant nonsuit, as the question of negligence was for jury, and judgment of Fulton Superior Court was *reversed*.

In **RICHMOND & DANVILLE R. R. CO. v. GREEN**, 73 Ga. 814 (1884), flagman injured by his hand being caught between dead blocks and projecting pin while trying to couple cars, the engineer not slackening speed of train according to signal, judgment for plaintiff for \$1,700 was *affirmed*.

**11. Machinists injured.***a. Flying object.*

In EAST TENNESSEE, VIRGINIA & GEORGIA R'Y CO. v. PERKINS, 88 Ga. 1 (October, 1891), railroad machinist injured by chip of steel which flew from a screw into his eye, he being engaged in trying to insert a set-screw into an eccentric, the injury being caused by alleged defect in the hole which had been tapped out for the screw, judgment for plaintiff in the Fulton Superior Court was reversed, the third point of the official syllabus stating the decision as follows:

"The verdict was not warranted by the evidence under the law, there being no sufficient ground for imputing to the defendant any negligence whatever in the matter of furnishing to the plaintiff an unfit instrument for the work in hand, but the evidence showing, on the contrary, that the plaintiff did not wait to have furnished to him such an instrument as the superintendent considered suitable and promised to furnish."

*b. Machinery.*

In RICHMOND & DANVILLE R. R. CO. v. DICKEY, 90 Ga. 491 (October, 1892), judgment for plaintiff in the City Court of Atlanta was reversed. The official syllabus states the case as follows:

"1. The allegation in the declaration that 'the defendant was negligent in not providing proper rules and orders for the transaction of business in its yard,' was not sustained by the evidence.

"2. There is no negligence in the construction of machinery which, when properly used in the ordinary manner, is safe under all conditions which will probably arise in any and every instance of such use. Hence, although it may have a defect, yet if that defect be one which does not interfere with its safe and proper use with reference to the purpose for which it was constructed, an injury to an employee's hand while accidentally in contact with the defective part of the machinery, but which was very unlikely to occur, cannot be attributed to negligence on the part of the company in the construction of the machinery.

"3. Taking into consideration the emergency in which, under the evidence, the plaintiff and his co-employee were acting, when the latter, by applying the brake, caused the injury to the former, neither of them was guilty of negligence, and it satisfactorily appears that the crushing of the plaintiff's hand was simply one of those unfortunate accidents incident to a business of this kind.

"4. The presumption which the law raises against the company having been removed by the evidence, there should have been no recovery for the plaintiff, and it was error to refuse a new trial."

In CENTRAL R. R. AND BANKING CO. v. CHAPMAN, 96 Ga. 769 (April, 1895), judgment for plaintiff in the Muscogee Superior Court was reversed, ATKINSON J., stating the case as follows in the official headnote: "It plainly appearing from the plaintiff's own testimony as a witness that he voluntarily and without being so ordered by any superior undertook to operate a dangerous machine with which he was unfamiliar, and that it was entirely outside of the scope of his regular employment so to do; and there being no emergency which would justify a departure by him from his ordinary line of duty, he was not entitled to recover from his master, the defendant, for injuries thus occasioned, although in point of fact the machine was at the time in a defective condition." [Lawton & Cunningham, appeared for plaintiff in error; Little, Wimbish & Little and J. E. Chapman, for defendant in error.]

In *HARRIGAN v. SAVANNAH, FLORIDA & WESTERN R'Y CO.*, 84 Ga. 793 (July, 1890), carpenter in defendant's employ injured by his hand being thrown against the teeth of a saw and three of his fingers being cut off, due to defect in saw-table, judgment on third trial for plaintiff for \$3,300 was *affirmed*. There were three trials upon each of which a verdict was returned for plaintiff. The presiding judge granted a new trial from the first verdict; on refusal to grant new trial after second verdict defendant appealed and new trial was granted (80 Ga. 602); on the third trial a new trial was granted from the verdict, from which plaintiff appealed. Judgment granting new trial *reversed*.

## 12. Section-hands injured.

In *MALOY v. PORT ROYAL & WESTERN CAROLINA R'Y CO.*, 97 Ga. 295 (1895), a demurrer for want of a cause of action was sustained and plaintiff excepted, Judgment in the City Court of Richmond county was *reversed*. The ruling in the Supreme Court was as follows: "A declaration filed by an employee of a railroad company to recover damages for injuries inflicted upon him in consequence of the negligence of a co-employee, which states the nature of the employment, the character of the work in which they were engaged, the extent of the injuries, and the amount of the damages, and likewise the circumstances under which he was injured, the latter being stated with such particularity as to show that he was himself free from fault, and was injured solely because of the negligence of his fellow-servants, sets forth substantially a cause of action, and a dismissal upon demurrer was erroneous." Plaintiff was a section-hand, and while working on the trestle the pole, which was used as a lever by plaintiff and co-employees, slipped from the block, throwing plaintiff upon the ground with great force across the small of his back.

In *EAST TENNESSEE, VIRGINIA & GEORGIA R'Y CO. v. BRIDGES*, 92 Ga. 399 (1893), section-hand injured in collision between hand car and freight train, judgment for plaintiff for \$1,600 in the City Court of Floyd county was *affirmed*. The official syllabus states the point decided as follows:

"2. The evidence showing affirmatively that the plaintiff was injured while engaged in the line of his duty, under the orders and in the immediate presence of the 'boss' to whose orders he was subject, and that the injury was the result of negligence attributable to the company, either the sole negligence of the 'boss' or the joint negligence of him and of absent officers or employees with whom he should have co-operated in so regulating the movements of his hand-car as to prevent a collision between it and a train, a recovery by the plaintiff would be defeated only by fault on his part amounting to rashness or recklessness in obeying under the circumstances the orders of the 'boss.' The evidence not making any such fault manifest, there was no reversible error in the charges complained of, or in refusing to charge the jury as requested."

In *CHATTANOOGA, ROME & COLUMBUS R. R. CO. v. WHITEHEAD*, 90 Ga. 47 (August, 1892), section-hand struck and fatally injured by a construction train, judgment for plaintiff for \$1,500 in the Floyd Superior Court was *affirmed*.

## 13. Switchmen injured — Various causes.

In *NELSON v. CENTRAL R. R. & BANKING CO.*, 88 Ga. 225 (January, 1892), switchman injured on footboard of engine, it was held that: "No negligence on the part of the company being alleged in the declaration except that 'the engine, by reason of the carelessness and negligence of the defendant, struck

-against the freight car with violence so great, unnecessary and unusual as to cause the draw-bar to hurl the coupling-pin from its place, causing it to strike against the left side of the head of your petitioner,' and the evidence of the plaintiff himself showing that there was no negligence in handling the engine, and that the real cause of the injury was that the brake was not in a proper condition for safe use, and that the plaintiff knew of the defect when he exposed himself to the danger, the court did not err in granting a nonsuit."

In *CENTRAL R. R. & BANKING Co. v. DICKSON*, 82 Ga. 629 (April, 1889), switchman on top of lumber car thrown from car by sudden slackening of speed without warning, his back and thumb being sprained, judgment for plaintiff in the City Court of Savannah was affirmed.

In *GEORGIA R. R. & BANKING Co. v. FRIDDELL*, 79 Ga. 489 (March, 1888), switchman in employ of defendant railway company injured by negligence of employees of another railroad company, judgment for plaintiff in the Fulton Superior Court was reversed. The points decided are thus stated in the official syllabus:

" 1. Two or more chartered railway companies whose lines terminate at the same point, that is, at the same town or city, are not bound as a matter of law to have and use separate terminal facilities, but may, within the corporate limits, use the same track in common with or without common ownership, and when they do so, a track thus used though the exclusive property of one of the companies, is, for the time being, the track of each company using it, and the proprietary company is not responsible to its employees for personal injuries which they sustain solely by reason of the negligent use of the track by the employees of another company. The redress for such injuries is against the company whose employees are at fault.

" 2. In *Macon & Augusta R. R. Co. v. Mayes*, 49 Ga. 355, the negligent company was using the franchise as well as the track of the proprietary company. In *Central R. R. Co. v. Perry*, 58 Ga. 461; *Perry v. Central R. R. Co.*, 66 Ga. 746, the injury was to a passenger. In *Coggin v. Central R. R. Co.*, 62 Ga. 685, the negligence was by an employee of the proprietary company, and the injury was to an employee of a telegraph company."

In *THOMPSON v. CENTRAL R. R. & BANKING Co.*, 54 Ga. 509 (1875), switchman injured by fall of bar of iron on his shoulder caused by carelessness of laborers in railroad yard, judgment of nonsuit in the Chatham Superior Court was reversed, it being held that a railroad company is liable for injuries to employee caused by negligence of other employees, and that the burden was on railroad company to show negligence of injured party and its own freedom from negligence.

On a subsequent trial of the Thompson case there was a verdict for plaintiff for \$3,750, which was set aside and a new trial granted, from which judgment plaintiff appealed. Judgment affirmed. See *THOMPSON v. CENTRAL RAILROAD*, 61 Ga. 120 (1878).

#### 14. Track-hands injured.

##### a. Flying object.

In *BAKER v. WESTERN & ATLANTIC R. R. Co.*, 68 Ga. 699 (1882), track-laborer injured in the eye caused by a small piece of iron or steel flying off from the stroke of a heavy hammer upon a cleaver, which cleaver plaintiff was holding while other laborers were cutting a bar to fit on the track, the negligence

alleged being defective hammer and tools, judgment in the Catoosa Superior Court was *affirmed*. The points decided are stated in the official syllabus to the report as follows:

"1. If an employee of a railroad company be injured without fault or negligence on his part through the negligence of another employee, he may recover. [Citing Code, § 3036.]

"2. It is the duty of a railroad company to furnish its employees reasonably safe tools and materials for their use in its service, but an employee who is aware of the dangerous condition of any particular tool or instrument, and nevertheless uses it, cannot have redress for an injury resulting therefrom. [Citing Central R. R. v. Kenney, 58 Ga. 485, 490; Johnson v. Western & Atlantic R. R., 55 Ga. 133; Western & Atlantic R. R. v. Bishop, 50 Ga. 465.]

"3. Nor will the fact that the employee knowingly undertook to use a dangerously defective tool under the immediate command of a superior employee, give him a right to recover." [Citing Western & Atlantic R. R. v. Adams, 55 Ga. 279.]

In **CENTRAL R. R. & BANKING CO. v. ATTAWAY**, 90 Ga. 656 (January, 1893), track-hand injured by use of defective tools by the boss or overseer whereby a piece of steel from a "cold chisel" flew into the employee's eye, judgment for plaintiff for \$1,425 in the City Court of Macon was *affirmed*.

In **GEORGIA R. R. & BANKING CO. v. COSSBY**, 97 Ga. 299 (1895), track-hand injured by negligence of co-employee, judgment for plaintiff in the Taliaferro Superior Court was *affirmed*. Plaintiff and a co-employee were repairing the track, the co-employee using a hammer to tap the spike which plaintiff held. When the spike was struck it flew up and hit plaintiff in the eye, gouging it nearly out, cutting his head to the bone, and knocking him to the ground.

*b. Run over by cars.*

In **STANLEY v. RICHMOND & DANVILLE EXTENSION CO.**, 72 Ga. 202 (1884), action by widow against the railroad for the homicide of her husband, the evidence for plaintiff was as follows: The deceased was employed by defendant to work on a railroad; while so employed, one A., as "boss," directed him, together with other hands, to push certain cars loaded with iron, and directed them to stand on the side and shove them; the deceased voluntarily placed himself between two flat cars, and while they were being pushed and in motion, he fell; the car ran over his foot or leg, and from the injury so received he died. It did not appear when the deceased placed himself between the cars, that the "boss" knew he had done so, or what relation this "boss" sustained to the deceased and his associates. *Held*, that the evidence failed to make out any case against the railroad, and a nonsuit was properly awarded. Judgment *affirmed*.

In **WESTERN AND ATLANTIC R. R. CO. v. ADAMS**, 55 Ga. 279 (July Term, 1875), it was *held* (as per official syllabus) that:

"1. An employee cannot recover damages from a railroad company for injuries sustained by him on account of the negligence of a co-employee, unless without fault himself, even though in performing the act which resulted in the injury he was acting under the orders of a superior.

"2. The charge, being without evidence to support it, was error." *So held*, in an action by a track-hand injured by falling in front of hand car while trying to alight from said car in alleged obedience to suggestion from boss. Judgment for plaintiff for \$1,000 *reversed*.

In **CENTRAL R. R. & BANKING CO. v. SMALL**, 80 Ga. 519 (1888), track-hand struck by engine and run over, his arm being cut off, judgment for plaintiff in the Chatham Superior Court was *affirmed*.

*c. Track-raisers injured.*

In **ATLANTA & RICHMOND AIR-LINE R'Y CO. v. AYERS**, 53 Ga. 12 (1874), track-raiser killed by falling from construction train, judgment for plaintiff for \$3,000 in the Hall Superior Court was *reversed*.

In **CAMPBELL v. ATLANTA & RICHMOND AIR-LINE R'Y CO.**, 53 Ga. 488 (1874), track-raiser thrown from car on which he was engaged in throwing off telegraph poles to be distributed along track, judgment granting new trial to defendant, after verdict rendered for plaintiff for \$4,500 in the Gwinnett Superior Court, was *affirmed*.

A subsequent appeal in the **CAMPBELL** case resulted in verdict and judgment for plaintiff being *reversed*. The former appeal in the Campbell case and the decision in **THOMPSON v. CENTRAL R. R. & BANKING CO.**, 54 Ga. 509, were compared and reconciled. See **ATLANTA & RICHMOND AIR-LINE R'Y CO. v. CAMPBELL**, 56 Ga. 586 (1876).

*d. Miscellaneous.*

In **SMITH v. GEORGIA R. R. & BANKING CO.**, 87 Ga. 764 (November, 1891), the official syllabus states the case as follows:

"1. A declaration filed by a track-hand of a railroad company, alleging that plaintiff was injured by a fall of earth caused by the negligence of the company, its agents and servants, is amendable by setting out the particulars constituting the alleged negligence, and also by averring that plaintiff himself was without fault. **Ellison v. Ga. R. R. & Banking Co.**, 87 Ga. 691.

"2. The declaration as amended sets out a cause of action although it does not distinctly allege that the plaintiff was ignorant of the danger to which he was subjected." Judgment sustaining demurrer *reversed*.

In **JONES v. GEORGIA SOUTHERN R. R. ET AL.**, 66 Ga. 558 (1881), track-hand injured by a co-employee, it was held that the suit being by an employee against a railroad to recover damages for an injury done to him by a co-employee, and the evidence failing to show either that he was without negligence or that there was negligence on the part of his fellow-servants, a nonsuit was properly awarded. Judgment of nonsuit in the Whitfield Superior Court was *affirmed*.

### 15. Train-hands injured — Various causes.

In **WORLDS v. GEORGIA R. R. CO.**, 99 Ga. 283 (1896), train-hand injured by lifting heavy load, judgment dismissing suit was *affirmed*, the official syllabus (per ATKINSON, J.) stating the ruling as follows:

"1. When one enters the service of another, he impliedly assumes the usual and ordinary risks incident to the employment about which he is engaged, and in discharging the duties which he has undertaken to perform, he is bound to take notice of the ordinary and familiar laws of nature applicable to the subject to which his employment relates; and if he fails to do this, and in consequence is injured, the injury is attributable to the risks of the employment, and the master is not liable.

"2. Where an employee of a railroad company, in the discharge of his duties, is directed to lift and carry an ordinary object, like a cross-tie, he is bound to

take notice that it is heavy and that a certain amount of physical strength will be required to accomplish the task; and if he misconceives the amount of physical strength to be exerted, and overstrains himself in lifting the tie and is thereby injured, the master is not liable. The fact that he was acting under the orders of a superior at the time does not alter the question, even though he might have had reason to believe that disobedience of the order would result in his dismissal."

In *GEORGIA R. R. & BANKING CO. v. GOLDWIRE*, 56 Ga. 196 (1876), train-hand injured by negligence of other employees, judgment for \$2,000 for plaintiff in the Morgan Superior Court was affirmed.

*Train-hand injured by falling appliance.*

In *GEORGIA R. R. & BANKING CO. v. MILLER*, 90 Ga. 571 (November, 1892), train-hand injured while assisting to put disabled engine in order, the eccentric falling on his hand and crushing it, judgment for plaintiff for \$2,000 in the Rockdale Superior Court was reversed, the third point in the official syllabus stating the case as follows:

"The allegations of the declaration being ambiguous and uncertain as to whether the negligence intended to be complained of was only the failure to warn the plaintiff generally that going under the engine and aiding in removing the eccentric was dangerous, or the further failure to warn him specially of the result of unfastening the eccentric and the consequences thereof when the fireman was about to remove the bolt, and it being very doubtful whether it was negligent at all to fail to give plaintiff the general warning indicated, and the evidence of negligence upon the theory that the special warning was not given being vague and uncertain, and it being apparent that it can be cleared up and made more satisfactory so as to show the cause to which the injury was really attributable, the ends of justice require a new trial."

*Train-hand falling from gravel train — Sudden jerk of train.*

In *CENTRAL R. R. & BANKING CO. v. SIMS*, 80 Ga. 749 (1888), train-hand working on gravel train thrown from cars by sudden jerk of train, his foot being crushed, judgment for plaintiff for \$1,275 in the City Court of Macon was reversed on the ground that the employee assumed the risks incident to the employment. It was held that "where a gravel or repair train is managed as usual, and the jerk complained of is only such as would be expected to occur on a train of that character in doing its work, the employees engaged on it or attached to it take the risk as incident to the service, and if injured by the jerk, cannot recover of the company."

A subsequent trial of the Sims case resulted in nonsuit which, on appeal, was affirmed. See *SIMS v. EAST & WEST R. R. CO. OF ALABAMA*, 84 Ga. 152 (1889).

*Train-hand falling from top of train.*

In *CENTRAL R. R. & BANKING CO. v. SMITH*, 82 Ga. 236 (December, 1888), it was held that "the action being by a train-hand for a personal injury alleged to have resulted from the carelessness and negligence of the conductor in ordering the train to leave the station before the plaintiff had time to perform a duty assigned to him on top of the train and get down, and the evidence failing to show that the conductor gave the order to start prematurely or improperly, a motion for a nonsuit should have been granted." Judgment for plaintiff in the

Washington Superior Court *reversed*. In attempting to get down from top of car to prevent danger of freezing, plaintiff's foot slipped and he fell to the ground from the top of the train.

*Yard-hand run over by engine.*

In **CENTRAL R. R. & BANKING CO. v. BRANTLEY**, 93 Ga. 259 (January, 1894), yard-hand attempting to fix switch struck by moving engine and run over and killed, judgment for plaintiff for \$8,000 in the Bibb Superior Court was *affirmed*.

**16. Watchmen injured.**

*a. Struck by trains.*

In **RICHMOND & DANVILLE R. R. CO. v. WATTS**, 92 Ga. 88 (1893), where Watts, a night watchman for the Western & Atlantic R. R. Co., while standing on the main track of the Georgia Pacific Railway Co., taking the numbers of certain cars which were upon the track of his own company near the track upon which he was standing, was run into by the train of the Georgia Pacific Railway Co., judgment for plaintiff for \$2,500 in the City Court of Atlanta, on second trial of the case, was *reversed* on the ground stated in the official syllabus as follows: "On the second trial of this case there was no evidence that by mutual consent, arising out of practice by watchmen and acquiescence therein, with knowledge on the part of the superintending officers, the railway companies permitted the watchmen employed by them respectively to walk and stand upon the unoccupied tracks, including the main lines, for the purpose of examining the standing cars, with a view to take and report the initials and numbering inscribed thereon. This being so, there was nothing to relieve the plaintiff below from the exercise of full diligence to protect himself; and had he exercised the ordinary diligence which is due from every intruder on a railway track to care for his own safety, he could have avoided the consequences to himself caused by the defendant's negligence. The court erred in not granting a new trial." [On a former trial of the WATTS case, 89 Ga. 277, 282, judgment of nonsuit was reversed.]

In **WATTS v. RICHMOND & DANVILLE R. R. CO.**, 89 Ga. 277 (1892), judgment of nonsuit in the City Court of Atlanta was *reversed*, the official syllabus stating the case as follows: "Where by mutual consent, evidenced by practice and by acquiescence therein with knowledge on the part of the superintending officers, two railway companies having their tracks adjacent and parallel, on some of which cars in large numbers are habitually left standing, permit the watchmen employed by the companies respectively to walk and stand upon the unoccupied tracks of each other, including the main lines, for the purpose of examining the standing cars with a view to take and report the initials and numbering thereon, a watchman while so employed and deporting himself in the usual way recognized as fit and proper by both companies, is not a trespasser upon the track of the company which did not employ him, any more than he is a trespasser upon the track of his own company. He is not a trespasser at all. And if, by the negligent and too rapid running of a train of the other company, he is suddenly stricken and injured, failing to protect himself in consequence of his attention being occupied with his duties, it is a question for a jury whether under all the circumstances he could have avoided the consequences of the company's negligence by the exercise of ordinary diligence. If he could not, he might recover; but if he could, he would have no cause of action. The

court erred in granting a nonsuit. *Ga. R. R. v. Pittman*, 73 Ga. 325. Judgment reversed."

In *JENKINS v. CENTRAL R. R. & BANKING CO.*, 89 Ga. 756 (1892), judgment of nonsuit in the City Court of Macon was affirmed, it being held that plaintiff could, by the exercise of ordinary care, have avoided the consequences of defendant's negligence. Plaintiff was a night-watchman for the East Tennessee R. R. Co., at its shops in Macon, his duty being to watch the cars and notice the seals on them. To the right of the East Tennessee track were two tracks of defendant. On the night of the accident plaintiff was standing on a cross-tie of one of defendant's tracks, and in turning saw a switch engine and two signals, and in trying to get off the track was struck by defendant's passenger train.

In *SAVANNAH, FLORIDA & WESTERN R'Y CO. v. FLANNAGAN*, 82 Ga. 579 (April, 1879), day-watchman in defendant's employ, at its wharves, run over and killed by engine propelled by company's servants, he returning home from work at the time of the accident, judgment for plaintiff for \$2,500 in the City Court of Savannah was affirmed.

*b. Miscellaneous.*

In *LUMPKIN v. SOUTHERN RAILWAY CO.*, 99 Ga. 111 (1896), where judgment of nonsuit was affirmed, it was held (as per official syllabus) by SIMMONS, Ch. J., as follows:

"The evidence for the plaintiff, who was in the employment of the defendant as a night-watchman, showing that its other employees, who were engaged in drilling cars and making up trains in an extensive yard where large numbers of cars were being constantly moved and shifted at all hours, were under no duty of giving him notice when they were about to put a car or cars in motion, and the proper inference from his own testimony being that it was incumbent on him, for his own protection, to inform them when he was about to enter or climb upon a standing car, and it appearing that he was injured at night by the sudden movement of a car laden with lumber, upon which he had climbed without informing the company's servants in charge of the engine by which the car was put in motion of his intention to get upon it, and that they neither knew nor could have known of his presence thereon, and it not appearing that they were, relatively to him, in any respect negligent in the manner of doing their work, the court was right in granting a nonsuit."

In *HAMILTON v. RICHMOND & DANVILLE R. R. CO.*, 83 Ga. 346 (1889), it was held that "where a watchman in a railroad yard uses a platform appropriated to the transfer of freights, for the purpose of running along it at night in the dark, he does so at his own risk, it not appearing that the platform was intended by the company for such a purpose, or that he had any reason to think it was so intended." Plaintiff, while running along the said platform in order to prevent a collision of trains, was thrown down and injured by coming in contact with some trucks improperly left upon the platform. Judgment of nonsuit in the City Court of Atlanta affirmed.

**17. Miscellaneous cases — Injuries to railroad employees.**

*Railroad agent run over by freight cars on side-track.*

*BRUNSWICK & WESTERN R. R. CO. v. SMITH*, 97 Ga. 777 (1896), was an action to recover damages for homicide of plaintiff's husband, an agent of defendant.

caused by alleged negligence of defendant. On the trial of the case in the Glynn Superior Court there was a verdict and judgment for plaintiff for \$2,000 which, on appeal, was *reversed*. The official syllabus states the case as follows:

"Where two freight-cars, one of which was used as a station warehouse, had been left 'unchocked' and 'unbraked' upon a side-track having a slight downward grade, and upon being put in motion by a sudden storm of wind, ran over and killed the railroad agent, who at the time was crossing the side-track, holding an umbrella over himself, inclined towards a blowing rain so as to obstruct from his view the approaching cars, the railroad company was not liable for the homicide, it appearing that the deceased was the sole employee of the railroad at the station, having at the time full charge of the locating of these cars upon the side-track in question; that on this particular occasion, they were left exactly as he directed; that he actually knew that the car by which he was stricken had not been 'chocked' or 'braked'; and that it was within the scope of his duty to know whether or not the other car (it being the warehouse car) had also been left in this condition. If leaving the cars without 'chocking' or applying brakes to the same was, under the circumstances, an act of negligence, it was negligence attributable to the agent himself."

*Bridge keeper struck by piece of wood from tender of engine.*

In *CENTRAL RAILROAD v. ROUSE*, 77 Ga. 393 (1887), bridge-keeper in employ of defendant company killed on track, it being alleged that while attending to his duties he was struck by a piece of wood which fell from the overloaded tender of an engine drawing a train at careless rate of speed over the bridge, judgment for plaintiff, the widow of the deceased employee, for \$4,000 in the Macon Superior Court was *reversed* for erroneous charge on damages. Held that "in a suit by a wife for the homicide of her husband, the number of minor children is not in issue, nor is their means of support." Held, also, that "the measure of damages in an action by a wife for the homicide of her husband, since the passage of the Act of 1878 (Code, § 2971) is not affected by the wants of the family, but depends solely on the value of the husband's life. In estimating such value by age, habits, health, occupation, expectation of life, ability to labor, probable increase or diminution of that ability with lapse of time, rate of wages, etc., the necessary personal expenses of the husband should be deducted; and the balance, reduced to its present value, would be the value of the life." On the second trial of the case there was a verdict and judgment for plaintiff which on appeal to the Supreme Court was *affirmed*. *CENTRAL R. R. & BANKING CO. v. ROUSE*, 80 Ga. 442 (1888).

*"Caller" carrying dispatch at night to office falling into pit on track.*

In *COUNTRYMAN v. EAST TENNESSEE, VIRGINIA & GEORGIA R'y Co.*, 89 Ga. 835 (1892), judgment of nonsuit in the City Court of Floyd county was *affirmed*, the evidence showing that plaintiff could, by the exercise of ordinary care, have avoided the result of defendant's negligence. Plaintiff was a "caller" at the railroad depot in East Rome, his duties being to wake up conductors, brakemen, and firemen when they were needed and were not at their places, and occasionally carried dispatches from the telegraph office to the railroad authorities. He was working under the night yard-master. On the night of the accident he was carrying a dispatch to the master-mechanic's office in the yard, and when between the turn-table and the water-tank, he fell into a pit about twelve feet long and three or four feet deep and was seriously injured.

*Employee alighting from rapidly-moving train.*

In *JARRETT v. ATLANTA & WEST POINT R. R. CO.*, 83 Ga. 347 (1889), it appeared that plaintiff, an employee of the Richmond & Danville R. R. Co., whose line terminated in Atlanta, boarded one of the passenger trains of the Atlanta & West Point R. R. Co., at the passenger depot, the starting point, for the purpose of going to the freight depot of the Central R. R., at the Mitchell street crossing, with the consent of the Atlanta & West Point R. R. Co., it being the custom of that and the other railroad companies terminating in Atlanta to permit employees of each other to ride from said passenger depot on outgoing trains to their freight depots or workshops. On arriving at his destination plaintiff got off the train, which was running at a high rate of speed at the crossing, and was thrown violently against the ground and against a pile of iron left at the crossing by the Central Railroad, and sustained serious and permanent injuries. On the trial in the City Court of Atlanta plaintiff was nonsuited which, on appeal, was affirmed, on the ground of contributory negligence.

*Collision between construction trains.*

In *GEORGIA R. R. & BANKING CO. v. KENT*, and *KENT v. GEORGIA R. R. & BANKING CO.*, 92 Ga. 782 (1893), judgment in first-named case for plaintiff in the Warren Superior Court was reversed for error in overruling demurrer, and in the second case judgment of nonsuit was affirmed. Plaintiff, a laborer on a construction train, was injured in collision with another train, his foot, thigh, back, etc., being injured. The official syllabus states the points as follows:

"1. An action for personal injuries against a railroad company is barred after the lapse of two years from the time the right of action accrued; and where the person injured, in consideration of a contract by the company to do certain things for his benefit and to give him employment for life, agreed not to bring suit and refrained from so doing for nearly eight years, his right of action is not relieved from the bar of the statute, although the company, in making the contract with him, did so for the purpose of deterring him from bringing his action within the time prescribed by law, it appearing also that the company had complied fully with all its undertakings other than that of giving the plaintiff employment for life, and had in fact employed him for more than seven years before he was discharged. If the plaintiff had any right of action at all against the company, it was for a breach of the contract by which his original cause of action against it was compromised and settled."

*Collision between train and coal cars.*

In *GEORGIA PACIFIC R'Y CO. v. MAPP*, 80 Ga. 631 (1888), employee of another while engaged in unloading coal from cars, on a private side-track, injured by defendant's train running into the cars which plaintiff was unloading, the collision driving the crow-bar, with which plaintiff was working, into his thigh to and along the bone making a serious wound, judgment for plaintiff for \$1,400 in the Fulton Superior Court was reversed on the ground of contributory negligence.

*Negligent running of cars.*

In *EAST TENNESSEE, VIRGINIA & GEORGIA R. R. CO. v. DUGGAN*, 51 Ga. 212 (1874), employee injured by negligent running of cars by another employee, a dirt cart being hitched to the rear of the train, judgment for \$1,254 for plaintiff in the Whitfield Superior Court was reversed. The syllabus to the official report

states the point decided as follows: "On the trial of a suit against a railroad company for damages to the plaintiff, who was an employee of the company, caused by the negligence of his co-employees, it was error in the court to permit the plaintiff to testify before the jury, that an assistant superior had told him, after the injury was done, that the company felt itself under obligations to support him and his family during his life."

*Negligent running of train.*

In *GALLOWAY v. WESTERN & ATLANTIC R. R. Co.*, 57 Ga. 512 (1876), employee injured by alleged negligent running of train by defendant's agent, judgment for defendant in the Fulton Superior Court was affirmed. "The mere fact that an employee was running over another railroad at the time of the injury does not release him from his agreement with the railroad company to assume all risks." "When the plaintiff receives and retains money from the company which employed him, on the faith of the statement by him that he did not mean to sue for damages, he is estopped from so doing."

*Employee killed by defective car.*

In *SAVANNAH, FLORIDA & WESTERN R'Y CO. v. BOOTH*, 98 Ga. 20 (1895), it was held that "where a railroad company furnishes to one of its patrons a car to be used by him in loading freight to be delivered to it for transportation, it is liable to a servant of the patron for injuries resulting to such servant from the defective construction of the car; provided the defect be of such a character as to be discoverable by the exercise of ordinary care upon the part of the railroad company, and provided further, the injuries complained of were inflicted under such circumstances as that the person injured, by the exercise of ordinary care, could not have avoided the consequences resulting to him from the negligent act of the railroad company in furnishing for the use of such patron and his servants such defective car." Judgment for plaintiff, widow of employee killed by reason of defective car, rendered in the Ware Superior Court, affirmed.

*Defective hand car.*

In *BELL v. WESTERN & ATLANTIC R. R.*, 70 Ga. 566 (April, 1883), it was held that where a railroad employee sued the company for damages resulting from a defective hand car, and the evidence for the plaintiff showed that he knew of the dangerous condition of the car, but nevertheless made use of it, such fact was fatal to his recovery and nonsuit was properly awarded. Held, also, that it did not alter the case that the employee knowingly undertook to use a dangerously defective tool under the immediate command of a superior employee. (Citing *Baker v. Western & Atlantic R. R.*, 68 Ga. 699.) Nonsuit affirmed.

*Injured by hand car.*

In *THOMAS v. GEORGIA RAILROAD & BANKING CO.*, 38 Ga. 222 (December Term, 1868), it was held that "by the provision of section 3329 of the Code, railroad companies are liable to be sued for injuries done to persons or property by the running of 'hand cars' upon their roads, as well as by the running of cars propelled by steam power, and may be sued therefor, in any county in which the cause of action originated." Dismissal of cause, in DeKalb Superior Court, reversed. Thomas brought case in De Kalb county against the company for breaking his arm by the careless running of one of their hand cars, by his fellow-servants, in said county.

*Employee killed by being knocked off top of car while passing under bridge.*

In *STIRK v. CENTRAL RAILROAD AND BANKING COMPANY OF GEORGIA, and VICE VERSA*, 79 Ga. 495 (October Term, 1887), employee on top of car killed by being knocked from car while passing under bridge, judgment of nonsuit was reversed, the official syllabus stating the ruling as follows:

"1. If the cars ordinarily used by a railroad company were such that the employees could stand upon the top of them without danger in passing under a bridge over the railroad, and if the company introduced into its train a car higher than those generally used by it, and gave no warning to its employees of the condition of such car, and an employee, who was ordered to release a bell-cord which had become entangled, went on top of the cars and was knocked from the higher car by the bridge and killed, the jury might infer that the company was negligent because of the increased hazard and danger to its employees, and on a suit by the widow of the dead employee against the railroad, it was error to grant a nonsuit. The question of the negligence of the railroad, and whether the deceased could have avoided the consequences thereof by the use of ordinary diligence, were for the jury." \* \* \*

*Employee injured by bar of iron dropped by another employee.*

In *EAST TENNESSEE, VIRGINIA & GEORGIA R'Y CO. v. SMITH*, 91 Ga. 176 (February, 1893), judgment for plaintiff for \$375 in the Whitfield Superior Court was reversed, it being held, as per official syllabus, as follows:

"Where an employee of a railroad company brought his action against it, alleging that he was injured by a co-employee's negligence in dropping a bar of iron which they were lifting, and the railroad company defended on the ground that the iron was not negligently dropped by the co-employee, but that its fall was caused by the accidental slipping of his foot, and there being some evidence to sustain this theory, it was error in the court to refuse to give in charge a written request of defendant that 'if the evidence shows that the injury was caused by the accidental slip of the foot or stumble of the witness Seay (the co-employee), then the plaintiff cannot recover.'

"While as a general proposition, a charge that if the injury was the result of an unavoidable accident the plaintiff could not recover, may have covered the request, the case was a proper one for applying the principle to the specific defense relied upon. *Metropolitan R. Co. v. Johnson*, 90 Ga. 500."

*Employee injured by fall of iron frame.*

In *SCHNIBBE v. CENTRAL R. R. & BANKING CO.*, 85 Ga. 592 (June, 1890), it was held that: "The plaintiff having been injured by the falling upon his foot of an iron frame while he was engaged with other servants of the defendant in moving it upon a truck, but there being shown no negligence of defendant or its servants, and plaintiff not having been unaware of the circumstances which he alleges as the cause of the injury, but having continued in the service of the company without objection, the grant of a nonsuit in the action brought by him for the injury was proper."

*Employee injured by fall of timber caused by carelessness of another employee.*

In *GEORGIA R. R. & BANKING CO. v. BROWN*, 86 Ga. 320 (1890), judgment for plaintiff for \$1,500 in the Richmond Superior Court was affirmed. Brown was employed by the railroad company to work in its shops, and was injured by

the falling of a certain piece of timber upon his foot, caused by alleged negligence of one of the employees of the company in failing to take hold of the timber, whereby, in consequence of its weight, it fell upon his foot and crushed it.

*Employee struck by timber thrown by another employee.*

In *TUTEN v. CENTRAL R. R. & BANKING CO.*, 88 Ga. 228 (January, 1892), laborer injured in railroad car-shops, it was held that: "Where two employees of a railway company have worked together a day and a half, one throwing timber through a window and the other receiving it on the outside and bearing it off; and where the one on the inside suddenly and without notice changes from a system of timing his throws through the window, which was safe to his fellow-laborer on the outside, to a system which was dangerous to the latter, and in consequence the latter was stricken with a piece of timber and injured, the case is one for reference to a jury on the question of negligence and contributory negligence, and the court erred in ordering a nonsuit. Judgment reversed."

*Employee injured by car wheels rolled against him.*

In *SAVANNAH, FLORIDA & WESTERN R'Y CO. v. GOSS*, 80 Ga. 524 (1888), railroad laborer employed in rolling trucks, or car-wheels connected by axles, upon a temporary track into the company's machine shop, injured by other wheels rolled down upon him from behind by other laborers, his foot being crushed, judgment for plaintiff for \$1,500 in the Chatham Superior Court was affirmed.

*Fall of ladder caused by act of employee which injured another employee.*

In *REEDY v. EAST TENNESSEE, VIRGINIA & GEORGIA R'Y CO.*, 87 Ga. 323 (May, 1891), it appeared that one Wood was in the employment of defendant, and Reedy, who had been employed by him as a laborer in transferring freight, was instructed by Wood to assist in putting up some wires for defendant. This instruction had been given at the request of a line repairer, to whom Wood was informed defendant's superintendent had directed he should furnish a couple of hands. There was evidence to authorize the inference that this repairer was the servant of the defendant. A ladder was placed against the depot wall, and extended some eight feet above the roof. The line repairer directed Reedy to take some wire and carry it up, which Reedy did, but only went part of the way and stopped. He was then ordered to go to the top of the ladder with the wire, but refused to do so. The repairer who had been holding the ladder, then let it loose, ran up it, passed Reedy, taking the wire from him as he did so, and sprang upon the roof, doing so in such a manner as to make the ladder fall with Reedy to the ground, and he was thus injured. Nonsuit was granted in the Floyd Superior Court. On appeal judgment was reversed, the question of negligence being for the jury.

**Notes of Hawaiian cases.**

*Master liable for negligent act of driver causing collision.*

In *WILLIAMS v. THE PANTHEON STABLES*, 8 Hawaiian Rep. 168, the defendants, who were livery stable proprietors, were held liable for negligent conduct of one of their drivers which resulted in

injuring plaintiff's horse in a collision between plaintiff's and defendant's vehicles.

*Person injured by negligent driving of defendant's servant.*

In AH SING and AH YOUNG v. MCINTYRE and GOMEZ, 7 Hawaiian Rep. 196 (*October, 1897*), action to recover damages alleged to have accrued to plaintiff from negligence of defendant McIntyre's servant (defendant Gomez) in driving McIntyre's horse and carriage along Hotel street, Honolulu, against plaintiff Ah You, it appeared that the police magistrate dismissed the case against McIntyre and rendered judgment against defendant Gomez for \$20, from which plaintiff appealed. The appeal was taken to Supreme Court chambers and was heard by McCully, J., who held that McIntyre was not liable and the Supreme Court (*per PRESTON, J.*) dismissed the appeal, following the rule in Parsons v. Winchell, 5 *Cush.* (Mass.) 592.

*Collision between wagon and bicycle — Liability of master for injury to third person caused by act of servant.*

In KALUA v. CAMARINOS, 11 Hawaiian Rep. 557 (*October, 1898*). collision between defendant's wagon and plaintiff who was riding a bicycle, caused by negligent driving of defendant's servant, it was held that "an administrator carrying on the business of his intestate is personally liable to a third person injured through the negligence of his servant employed in the business while acting within the scope of his employment. An administrator as such cannot commit a trespass." Appeal from judgment of District court for defendant sustained.

**Notes of Idaho cases.**

*Employee in mine injured by fall of defective appliance.*

In HARVEY v. ALTURAS GOLD MINING CO., LIMITED, 3 Idaho (Hasbrouck) 510 (*January, 1893*), pumpman employed in one of defendant's mines, injured by defective cylinder to pump, which fell and crushed plaintiff's arms, judgment for \$10,000 for plaintiff in the Elmore County District Court was affirmed. RICHARD Z. JOHNSON & SONS, appeared for appellant; LYTTLETON PRICE, for respondent. The opinion was rendered by MORGAN, J., the points of which are stated in the syllabus by the court as follows:

"The general rule as between master and servant is, a servant undertakes, when he engages in a certain kind of work, that he has the necessary skill and experience to perform the work he undertakes; that he understands the management of the machinery

necessary to perform this work, the machinery generally used to perform such work, or the particular machinery which he sees is in use in this particular instance. That he will exercise the necessary care used by a man of prudence in doing such work as he is obliged to perform for his employer; if he fails in either of these, and is injured in consequence thereof, he is guilty of contributory negligence and cannot recover.

" On the other hand, his employer engages to furnish machinery and tools ordinarily used in the performance of such work; that he will keep such machinery and tools in a reasonably safe and good condition while such work is being performed. If the employer fails in either of these particulars and the servant is injured thereby, the servant, having filled all the conditions required on his part, can recover a reasonable sum for damages by him suffered.

" If the servant, after engaging in the work, finds the tools defective and not in good condition, and that some of them are dangerous, then he is charged with another duty — that of informing his employer, or his agent who is directing the work, of such defect.

" If the employer, after being informed, refuses to put the machinery or tools in good condition, the servant should decline to do the work with such machinery; if he does not do so, and is injured thereby, he cannot recover. And if, when so informed, the employer promises to remedy the defect within a reasonable time, the servant may continue in the work, and if he is injured within such reasonable time, without any fault on his part, he can recover for such injury.

" The question as to whether the injury occurred within a reasonable time after the promise made to repair the defective machinery is a question for the jury, with proper instructions from the court.

" If the promises are such that a prudent man might reasonably rely upon them with confidence that they would be fulfilled, he may continue in the work, and if he is injured thereby, he may recover damages from his employer."

*Employee in mine injured by carelessness of fellow-servant.*

In **SNYDER v. VIOLA MINING & SMELTING CO.**, 3 Idaho (Hasbrouck) 28 (March, 1891), judgment for plaintiff in the Lemhi County District Court was reversed, the syllabus by the court stating the case as follows:

" I. S. was a miner engaged in underground work, G. was a blacksmith engaged in same mine in sharpening tools for use of miners, and whose duty it was to deliver such tools, after being

sharpened, to miners at work in the mine. *Held*, that S. and G. were fellow-servants; and held further, that the carelessness in delivering such tools to miners by G., whereby S. was injured, defendant was not liable, defendant not being shown to be in fault.

" 2. Where the evidence shows that the defendant had furnished safe and convenient machinery and appliances for the performance of the required labor, and either the plaintiff or his fellow-servant, or both, for their own convenience, had seen fit to use other means or appliances than those furnished by defendant, and injury results therefrom, the defendant is not liable, and in such case plaintiff is guilty of contributory negligence." (STEWART & MORGAN appeared for appellant; HAWLEY, REEVES & QUARLES, for respondent.)

*Fireman killed in railroad accident — Defective track.*

In DRAKE v. UNION PACIFIC R'Y CO., 2 Idaho (Hasbrouck) 487 (*March, 1889*), fireman on locomotive killed in railroad accident caused by defective track, ice and snow accumulation, etc., judgment for \$3,000 for plaintiff in the Bear Lake County District Court was *reversed*, the official syllabus stating the case as follows:

" Where a fireman upon a locomotive engine, in discharge of his duty, with full knowledge of the nature and extent of the dangers of the service he is engaged in, or having the means of being informed of such facts and conditions by the exercise of ordinary care, voluntarily assumes such risks, and is thereby injured, and the employer is guilty of no laches or misconduct unknown to the servant, or which with ordinary care he might have known, he cannot recover for such injury." P. L. WILLIAMS and W. H. SAVIDGE, appeared for appellant (defendant below); SMITH & SMITH and R. D. WINTERS, for respondent.

*Railroad auditor injured in derailment of car.*

In MINTY v. UNION PACIFIC R'Y CO., 2 Idaho (Hasbrouck) 471 (*March, 1889*), traveling auditor in employ of defendant railway company injured in derailment of car in which he was traveling, judgment for plaintiff for \$4,000, on verdict rendered in the District Court of Oneida County, was *reversed*, it being *held* that plaintiff, in traveling in the performance of his duties, assumed the ordinary risks incident to the employment. In such case it was held that, until the contrary is shown, the presumption was that the company was not in fault, and that, in order to recover, plaintiff must show that he did not have knowledge of the defect, if any, which caused the accident, and that the accident was not a hazard, was not a risk incident to his business. There were also erroneous instructions as

to presumption of negligence and burden of proof. P. L. WILLIAMS and W. H. SAVIDGE, appeared for appellant; SMITH & SMITH and R. D. WINTERS, for respondent.

*Railroad employee killed in derailment of train.*

In PALMER v. UTAH & NORTHERN R'Y CO., 2 Idaho (Hasbrouck), 315 (*February, 1887*), employee riding on passenger train killed in derailment of train, a car falling upon him, it being alleged that the accident was caused by a broken rail which defendant negligently allowed to be on the track, judgment for plaintiff in the Bingham County District Court was *reversed* on the question of practice. The official syllabus (point 2) holds that "a judgment in favor of a party guilty of improper conduct calculated to influence the jury, or any juror, in their favor in rendering the verdict, should be reversed, and a new trial granted, on the ground of public policy." It was also held (point 3 of the official syllabus) that "a railroad corporation is liable for damages to employees injured through the negligence of their agents or servants who are invested with a controlling and superior duty in the management of the business of the corporation." P. L. WILLIAMS and HOMER STULL, appeared for appellant; H. M. BENNETT and SMITH & WRIGHT, for respondent.

## THE EAST ST. LOUIS PACKING AND PROVISION COMPANY v. HIGHTOWER.

*Supreme Court, Illinois, June Term, 1879.*

[Reported in 92 Ill. 139.]

**FIREMAN INJURED BY DEFECTIVE PIPE TO BOILERS — NOTICE OF DEFECT — INSTRUCTION.** — Where a fireman in defendant's employ was injured by the breaking of a blow-off pipe while attending to the boilers of defendant's engine, it was error to give an instruction which ignored the element that to fix responsibility upon the defendant it is essential to show knowledge, or that knowledge might have been obtained by the use of reasonable diligence, of the defect in the pipe which caused the injury, as without this element there could be no recovery on the part of the injured person.

**COMPARATIVE NEGLIGENCE — INSTRUCTION.** — Where the plaintiff is guilty of contributory negligence he cannot recover, unless it appears that his negligence was slight and that of the defendant gross in comparison

with each other, and both these terms should be stated in an instruction to the jury (1).

**PLEADING AND PROOF — INSTRUCTION.** — An instruction which has no basis, either in the pleading or the proof, should not be given.

**APPEAL** from a judgment for plaintiff for \$1,000 rendered in the City Court of East St. Louis. The facts are stated in the opinion. *Judgment reversed.*

JOHN B. BOWMAN and L. H. HITE, for appellant.

M. MILLARD, for appellee.

**Scholfield, J.** — This was an action on the case by appellee against appellant for negligence resulting in personal injury. The declaration contains but a single count.

The allegation is that appellee, on November 8, 1874, was an employee, as fireman, in appellant's pork packing establishment, "to attend to the furnace and keep up the fire of the engine and boilers, and to assist in oiling machinery connected therewith, and in regulating the supply of water for said boilers, and in blowing the same out as occasion should require;" and that appellant "wrongfully and negligently permitted a certain blow-off pipe connected with said boilers to be so improperly constructed, fastened, arranged, and out of repair," that while appellee "was then and there engaged, with due care and diligence, in blowing out said boilers, said pipe broke loose from its fastening and struck" appellee, etc. Appellant pleaded not guilty. The jury returned a verdict on the trial in favor of appellee, assessing his damages at \$1,000. The court, after overruling a motion for a new trial, gave judgment on this verdict.

Appellee testified that while he was blowing off appellant's boilers one of the blow-off pipes flew up and struck him on the left shoulder, breaking the shoulder bone.

There is no dispute as to the fact that appellee was, in some way, injured on his shoulder quite seriously. But there is conflict in the evidence whether the injury was inflicted in the way he says. There is also conflict in the evidence whether appellant knew, or by the exercise of reasonable diligence might have known, that the blow-off pipe was unsafe.

One witness testified on this point that one of the blow-off pipes blew up three or four weeks before appellee got hurt, and

1. The doctrine of comparative negligence has been abrogated in Illinois. See numerous cases showing the abrogation of the rule, reported with the Illinois cases in this volume of Am. Neg. Cas.

that the machinist having charge of such repairs, the last time he fixed the pipes before appellee got hurt, did not have time to fasten the middle pipes.

Other witnesses testify that the pipes were not, at the time appellee was injured, out of repair or dangerous, and that it is not possible that appellee could have been injured in the manner that he says he was.

It does not appear from the evidence but that appellee may have been as fully informed in regard to the condition of these pipes, at and before the accident, as any other employee of appellee was, or that, as originally constructed, they were unsafe or dangerous by reason of defective material or inferior workmanship.

The court, at the instance of appellee, gave, among others, these instructions to the jury, to which appellant excepted:

"1. If the evidence shows that the plaintiff was injured through any defect in the construction of the pipes in consequence of their being out of repair, or in an unsafe condition, then he is entitled to recover, if he used due care while attempting to blow out the pipe."

"5. If the negligence of plaintiff was slight, in comparison with that of the defendant, he is entitled to recover."

"6. The defendant is responsible for the conduct of the engineer (McCoy) while acting within the scope of his authority and the line of his duty."

The first instruction ignores the element that to charge appellant it is essential to show knowledge, or that knowledge might have been obtained by the use of reasonable diligence, of the defect in the pipe which caused the injury, and without this there could be no recovery in such cases. *Chicago & A. R. Co. v. Platt*, 89 Ill. 141; *Col., C. & Ind. Cent. R. Co. v. Troesch*, 68 Ill. 545 (1). The burden was upon appellee to make this proof. *Allen v. New Gas Co.*, 1 Exch. 251 (2).

The fifth instruction omits the element of the gross negligence

1. See these cases reported with the Illinois cases in this volume of *AM. NEG. CAS., post.*

2. In *Allen v. New Gas Co.*, 1 Exch. 251, it was held that the defendant company was not liable to plaintiff, a workman in its employ, who had passed

through certain gates when open, but on his return one of them was closed, and while he was working near them the gates fell and injured him, there being no evidence to show how the accident happened, nor any evidence as to the incompetency of other persons employed by the company.

of the appellant. Where the plaintiff is guilty of contributory negligence he cannot recover, unless it appears that his negligence was slight and that of the defendant gross in comparison with each other. Both terms must be stated to enable the jury to obtain a correct apprehension of the rule. Ill. Cent. R. Co. v. Hammer, 72 Ill. 347 (1).

The sixth instruction has no basis, either in the declaration or the evidence, whereon to rest. It is not alleged, nor is there a particle of proof, that the conduct of the engineer, McCoy, while acting within the scope of his authority, or the line of his duty, caused or materially contributed to the injury complained of.

The judgment is reversed and the cause remanded.

1. *Rule of comparative negligence.* — In ILLINOIS CENTRAL R. R. CO. v. HAMMER, 72 Ill. 347 (1874), judgment for plaintiff was reversed on the ground of failure of the court to properly charge the jury on the question of negligence of parties and in ignoring the rule of comparative negligence. Referring to this rule the court said:

"Where, as in this case, both parties are at fault, it is for the jury, under proper instructions, to say, from all the circumstances appearing in evidence, whether the negligence of plaintiff is slight, and that of defendant is gross. If not, then such a plaintiff cannot recover.

"The rule announced in the English decisions, and of the courts of some of the States of the Union, is, that the plaintiff must be free from all contributory negligence, but, even under that rule, the courts frequently hold that a want of caution is not contributory, especially where the conduct of a defendant is grossly negligent. We may have slightly modified the rule, but we have never intended to announce, as a rule, that the mere preponderance of negligence entitles a plaintiff to recover.

"The rule on this subject, it may be, has not at all times been accurately stated by this court. By inadvertance, it has been loosely and indefinitely

stated in some of the cases, but what the court has held, and still holds, is, that a plaintiff free from all negligence may recover from a defendant who has failed to use such care as ordinary prudent men generally employ; or, a plaintiff who is even guilty of slight negligence may recover of a defendant who has been grossly negligent, or whose conduct has been wanton or wilful. Hence the doctrine of comparative negligence. It would therefore be error for the court, in a case where it is claimed that the negligence of the defendant is gross, to instruct that the plaintiff must have been entirely free from negligence, as, in such a case, he may recover, although he has been guilty of negligence, if it is slight, and that of the defendant gross. It is equally inaccurate for the court to instruct the jury that the plaintiff may recover if the negligence of the defendant was greater than that of the plaintiff. The rule, as here stated, is the doctrine of this court, and to it we have been long committed, and to it we shall adhere." \* \* \*

"The instructions given for appellant, as modified, wholly ignore the rule of comparative negligence. As we understand them, more than one informs the jury that, although plaintiff may have been guilty of gross negligence, he might still recover if the

*Employee injured by bursting of an emery stone — Defective machinery.*

CAMP POINT MANUFACTURING COMPANY v. BALLOU, ADM'R, 71 Ill. 417 (1874), was an action brought to recover for damages occasioned by the death of plaintiff's intestate, in consequence of the bursting of an emery-stone, at which he was engaged, in grinding and polishing irons used in the construction of agricultural implements. The stone was mounted on a wooden frame, and moved by a steam engine, which propelled the other machinery in the defendant's factory. It turned upon an iron axle, and was supported and held to its place by means of iron clamps, or "flanches," which were tightened upon the stone by nuts turning on a screw thread, cut on the axle. The engine had a governor attached, the office of which was to regulate the motion of the engine. The negligence charged was defects in the machinery. On the trial in the Circuit Court of Adams county, plaintiff recovered verdict and judgment. Defendant appealed and judgment was reversed on ground of erroneous instructions as to care and diligence required of master in providing suitable and safe machinery.

*Explosion of steam tank — Instruction.*

In ALLERTON PACKING COMPANY v. EGAN, 86 Ill. 253 (1877), employee injured by explosion of steam tank which was being operated by defendant, judgment for plaintiff in the Circuit Court of Cook county was reversed for error in refusing defendant's request to charge as to plaintiff's own negligence, namely, that no recovery could be had if the explosion was caused by plaintiff's own act in changing the safety-valve intentionally, or by running against it accidentally, and failing to report the fact to the engineer. If he changed the safety-valve intentionally, the act was reckless, and if by running against it, his failure to notify the engineer was gross negligence.

defendant was guilty of greater negligence. We are unable to imagine a case in which a plaintiff, guilty of gross negligence, could recover. The court should, if not accurate, have refused appellant's instructions, or modified them so as to have stated the law correctly. When modified, these instructions were as well calculated to prevent the jury from fairly considering the

question of comparative negligence, as had the error been in appellee's instructions. These instructions were calculated to and may have misled the jury."

The HAMMER case, *supra*, was an action for injuries sustained by plaintiff while walking on defendant's track, he being struck and run over by one of defendant's trains making a flying switch.

**THE MISSOURI FURNACE COMPANY v. ABEND.***Supreme Court, Illinois, June, 1883.*

[Reported in 107 Ill. 44.]

**ENGINE-DRIVER KILLED BY FALLING FROM FOOT-BOARD — DUE CARE AND DILIGENCE — PROOF.** — In an action to recover damages for the death of plaintiff's intestate, an engine-driver on a switch locomotive used by the defendant company for moving cars in and about its yards, where it appeared that he, in some way, fell from the locomotive and was run over and killed, the negligence charged being a defective foot board from which he fell while in the act of oiling the locomotive, and although no one saw the accident the testimony was that the deceased was seen a few moments before his death in the observance of due care, it was held that it could not be said that there was entire want of evidence as to due care on the part of the deceased. Positive proof of due care on the part of plaintiff is not always required; under certain circumstances it may be taken for granted that such due care was exercised.

**PROMISE TO REPAIR — CONTINUANCE IN SERVICE — QUESTION FOR JURY.** — Whether an employee is guilty of negligence in continuing in his employer's service after knowledge of a defect in machinery or appliances, and on promise that such defects should be remedied, is a question of fact for the jury to determine.

**MASTER AND SERVANT — LIABILITY — ASSUMPTION OF RISK — DEFECTIVE MACHINERY — PROMISE TO REPAIR.** — A party entering the service of a railroad company, or other corporation using locomotives as propelling power, assumes, by his contract of employment, all the ordinary hazards arising from the performance of the duties of his voluntary engagement, and for an injury arising out of any of the ordinary perils incident to such service, no recovery can be had.

It is, however, the duty of the employer not to expose the employee to other perils not within those commonly known to be incident to the service he is expected to perform. On this principle it is the implied duty of the master to furnish reasonably safe machinery for use, and to observe ordinary care in selecting fellow-servants.

Should the employee discover that the service had become more hazardous than usual, or than he had anticipated, by reason of defective machinery, the retaining of unfaithful fellow-servants, or for any other cause, the general rule is, he must quit the service or assume the extra risks to which he is exposed. The relation of master and servant imposes no obligation on the master to take more care of the servant than the servant is willing to observe for his own personal safety.

But the general rule thus stated admits of exceptions. Where the master, on being notified by the servants of defects that render the service he is engaged to perform more hazardous, expressly promises to make needed repairs, the servant may continue in the employment a reasonable time to permit the performance of a promise in that regard without being guilty of negligence, and if any injury results therefrom he may recover, unless

when the danger is so imminent that no prudent man would undertake to perform the service. The promise of the master to repair defects relieves the servant from the charge of negligence by continuing in the service after the discovery of the extra perils to which he would be exposed.

**APPEAL** from the Appellate Court for the Fourth District (9 Bradw. Ill. App. 319), heard in that court on appeal from the Circuit Court of St. Clair county. *Judgment for plaintiff affirmed.*

"On February 21, 1880, Charles Castaine, since deceased, was in the employ of the Missouri Furnace Company, as engine-driver on the switch locomotive used by the company for moving cars in and about its yards. While thus employed on that day, he in some way fell from the locomotive, and was run over by it and killed. Afterwards the administrator of his estate brought this suit against the company to recover damages resulting to the widow and next of kin on account of the death of the intestate, which it is alleged was caused by the negligent conduct of defendant. Recitals in the declaration set forth the duty of defendant to keep the engine in suitable repair, and as a breach of that duty it is averred defendant permitted the engine to become and remain out of repair, and dangerous to the engine-driver. Among the principal defects that led to and caused the death of the intestate, it is averred the engine was so constructed it could not be oiled except when running; that it was out of repair, and dangerous to the employee, and that there was no platform or other safeguards so as to protect such employee while engaged in oiling and running it; and that the foot-board in front of the engine was out of repair, and in an unsafe condition. It is also further alleged, that 'on the 21st of February Charles Castaine was in the employ of defendant, and was engaged in running said engine on said railroad, as engineer, and that then and there he complained to said defendant, and notified it of the said defective and dangerous condition of said engine, and said defendant caused the said Charles Castaine to remain and continue in said employment by then and there promising him that said defects, including the repairing of said foot-board, would be speedily repaired and remedied; that defendant did not heed its duty in this respect, and failed and neglected to remedy said defects; and that on said 21st day of February, and while he was in the employ of defendant as engineer, and was engaged in running said engine, using due care and diligence, he was, in consequence of said defects, thrown with great force and

violence from said engine, and was thereby then and there killed.' The names of the widow and children surviving the deceased are stated in the declaration, and it then averred that in consequence of his death they were deprived of the support he had hitherto given them. A demurrer interposed to the amended declaration was overruled, and defendant pleaded the general issue, on which a trial was had, which resulted in a verdict for plaintiff, on which judgment was rendered. The first judgment for plaintiff was reversed, on defendant's appeal, by the Appellate Court. On the second trial plaintiff recovered a second verdict in the sum of \$3,000. The motion made for a new trial was overruled, and the court pronounced judgment on the verdict. This latter judgment, on the appeal of defendant, was affirmed in the Appellate Court for the Fourth District, and defendant brings the case to this court on its further appeal."

G. & G. A. KOERNER, for appellant.

JAMES M. DILL, for appellee.

**Scott, J.** — It is not insisted in this court, as was done in the courts below, that the verdict is against the weight of the evidence, nor is it expected this court will re-examine the evidence on controverted questions of fact. It will be assumed that whatever the evidence tends to prove was found in favor of plaintiff, and that finding, under the Practice act, is, of course, conclusive on this court. It is said, however, there is an entire want of evidence to sustain the averment of the declaration that deceased "used due care and diligence" for his personal safety, and that this defect is fatal to the present recovery. No one saw the accident, but the evidence warrants the belief that deceased fell from the foot-board while in the act of oiling the engine when in motion, and was killed. The concession of counsel is, no doubt, correct, it does not always require positive proof of the exercise of due care and diligence. Under certain circumstances it may be taken for granted deceased observed usual and ordinary care for his personal safety. That is the case here. The testimony from all sources is, that deceased was a competent and careful engineer. There is some evidence tending to show the engine could not well be oiled, on account of its peculiar construction, except when in motion, and the jury must have so found. Had the foot-board been in order, there would have been no danger in so doing. It was the usual mode of oiling the engine. The deceased was seen, a few moments before

his death, in the observance of due care. In the brief period that intervened it is unreasonable to believe he ceased to use the ordinary care that he had been accustomed to observe during the whole time he had been in the company's employ. All the circumstances tend to show the exercise of due care and caution on the part of deceased at the time of the accident, so that it is not accurate to say there was an entire want of evidence on this branch of the case. A similar objection was taken in Chicago, B. & Q. R. Co. *v.* Gregory, 58 Ill. 272. In that case it was said: "Up to within a moment of the accident, he," deceased, "was shown to have been in the exercise of due care in his proper place, and it would do violence to the facts in the case to presume that in the instant that intervened he was guilty of negligence, in the absence of proof of any circumstances that even tend to establish the fact of negligence." No one in that case saw the accident, and no affirmative evidence was given as to what care the deceased observed. It was thought to have been made to appear from the circumstances attending the accident, and it was said it was immaterial how the fact was made to appear, so it did not appear.

Passing on, the principal question made will be briefly considered. It is, whether deceased was, himself, guilty of such negligence by remaining in defendant's service after he knew the foot-board was in a dangerous condition, as will bar a recovery. The proof is, deceased notified the proper officers of the company whose duty it was to make and direct when repairs should be made, of the dangerous condition of the foot-board, and the averment is, defendant "caused the said Charles Castaine to remain and continue in said employment by then and there promising him that said defects, including the repairing of the foot-board, would be speedily repaired and remedied; that defendant did not heed its duty in this respect and failed and neglected to remedy said defects." There was evidence tending to sustain this averment in the declaration, and, of course, it will be assumed, for the purpose of this decision, the jury so found in support of the verdict, and the affirmance of the judgment by the Appellate Court implies a finding of the facts in the same way. It only remains, therefore, to consider the questions of law raised. On this branch of the case the court gave the following instruction for plaintiff: "The court instructs the jury, that if they believe, from the evidence, that the deceased, Charles

Castaine, while in the exercise of due care and caution, was killed in consequence of the defective condition of the engine used by defendant, as alleged in the declaration, and if they further believe, from the evidence, that the said Castaine, shortly before his death, called the attention of the superintendent and foreman-carpenter of the defendant to said defects, and that said persons, or either of them, then had authority to remedy said defects, and that said persons, or either of them, thereupon promised the said Castaine that said defects should be remedied, and that said Castaine relying upon such promise, remained in the employ of the defendant until he was killed, as aforesaid, then the jury must find for the plaintiff." This charge is not subject to the criticisms made upon it, that it assumes deceased was in the exercise of due care and diligence. Nor is it true there was no evidence on which to base it. As has been seen, there were circumstances tending to show deceased observed ordinary care, and that was sufficient to warrant the giving of the instruction. But the objection most elaborated in the argument is, the "instruction lays down as law that a mere promise to repair justified the deceased to use the foot-board, though he knew it was dangerous." The principle embodied in this charge is broader than the objection taken assumes it to be. It proceeds on the theory, deceased, "relying upon said promise, remained in the employ of the defendant until he was killed."

The questions raised and discussed on this record have not heretofore been considered by the court in the exact form now presented, and the court is at liberty to determine them as upon first impression. The principles that lead up to the precise questions involved have been the subject of frequent discussion in this court. A party entering the service of a railroad company, or other corporation using locomotives as propelling power, assumes, by his contract of employment, all the ordinary hazards arising from the performance of the duties of his voluntary engagement. Where a person is injured by any of the ordinary perils incident to such service, however sad the consequences, the law will afford him no remedy. It is, however, the duty of the employer not to expose the employee to other perils not within those commonly known to be incident to the service he is expected to perform. On this principle it is the implied duty of the master to furnish reasonably safe machinery for use, and to observe ordinary care in the selection of fellow-servants.

Should the employee discover the service had become more hazardous than usual, or than he anticipated, by reason of defective machinery, the retaining of unfaithful fellow-servants, or for any other cause, the general rule is, he must quit the service or assume the extra risks to which he is exposed. The rule of law in this respect rests on a correct principle. Where the servant discovers defects in machinery, or anything else that renders the service more hazardous, no matter from what cause the same may arise, it is all-important he should report the same to the common master, or at least to persons in the employ of the master whose duty it is to correct the same. Unless he does so the law has wisely provided he cannot recover from the employer for injuries occasioned by extra perils he voluntarily encounters, without notice to the master. The relation of master and servant imposes no obligation on the master to take more care of the servant than the servant is willing to observe for his own personal safety. Indianapolis, B. & W. R'y Co. *v.* Flanagan, 77 Ill. 365; Penn. Co. *v.* Lynch, 90 Ill. 334; Columbus, C. & Ind. Cent. R'y Co. *v.* Troesch, 68 Ill. 545 (1).

But the general rule thus stated admits of exceptions. It is now uniformly stated by text writers, that where the master, on being notified by the servant of defects that render the service he is engaged to perform more hazardous, expressly promises to make the needed repairs, the servant may continue in the employment a reasonable time to permit the performance of a promise in that regard without being guilty of negligence, and if any injury results therefrom he may recover, unless when the danger is so imminent that no prudent person would undertake to perform the service. Shearm. & Redf. on Neg., sec. 56; Cooley on Torts, 559; Wharton on Neg. 220. The doctrine on this subject rests on sound principle, and it will be found to be supported by English and American decisions. The reason upon which the rule is said to rest is, that the promise of the master to repair defects relieves the servant from the charge of negligence by continuing in the service after the discovery of the extra perils to which he would be exposed. Patterson *v.* P. & C. R. R. Co., 76 Pa. St. 389; Conrad *v.* Vulcan Iron Works, 62 Mo. 35; Hough *v.* R'y Co., 100 U. S. 213; Holmes *v.* Clark, 6

1. The Illinois cases cited in the case at bar are reported with the Illinois cases in this volume of AM. NEG. CAS.

H. & N. 348; *Clark v. Holmes*, 7 H. & N. 937 (1). The facts in *Holmes v. Clark*, *supra*, as shortly stated by Pollock, C. B., are, that when plaintiff entered into defendant's service the machinery was protected by an iron guard, but after he had been some months in the service the guard was broken, either by accident or decay, and the machinery remained unprotected. The plaintiff complained of it more than once, and was told the guard should be restored. This was done, and whilst plaintiff, in the course of his duty, was oiling the machinery, he sustained the injury for which the action was brought. Against plaintiff's right to recover on the facts as stated, two points were made, one a matter of fact, the other of law. It was said plaintiff's own negligence caused the injury; but that was regarded as a question of fact, which the jury found in favor of plaintiff, and that was taken as conclusive. The point of law was, that plaintiff having undertaken a dangerous service, with knowledge of the danger, could not recover damages in consequence of an injury which ensued from the risk he had voluntarily undertaken. In ruling against the position taken by defendant, the court said: "Many cases might be put in which a servant might reasonably incur the risk instead of abandoning the service, and if, during a period when the danger of the service is increased by the machinery becoming unprotected, either by accident or decay, or from other cause, the servant complains, and the master promises that the protection shall be restored, it must be considered that the master takes upon himself the responsibility of any accident that may occur during that period." The doctrine of this case was afterwards affirmed in *Clark v. Holmes*, *supra*, on appeal. The American cases cited all follow closely the doctrine of these English cases. Running through all the cases examined on this subject is the principle that if the danger from continuing in the master's service is so imminent that no one but a person utterly reckless of his personal safety would venture

1. In *Clark v. Holmes*, 7 Hurl. & N. 937, it appeared that the plaintiff was employed by the defendant to oil dangerous machinery. At the time the plaintiff entered upon the service the machinery was fenced, but the fencing became broken by accident. The plaintiff complained of the dangerous state of the machinery, and the defendant promised him that the fencing should be restored. The plaintiff, without any negligence on his part, was severely injured in consequence of the machinery remaining unfenced. Held, that the defendant was liable for the injury. This appears to affirm *Holmes v. Clark*, 6 H. & N. 349.

upon it, the master is not responsible. Under such circumstances the law holds it to be negligence on the part of the servant that will bar any recovery in case of accident. It is, however, a question of fact, to be found as any other fact in the case, whether the servant is guilty of negligence by continuing to use defective machinery for a reasonable time for the fulfillment of the promise after the master has promised to make the needed repairs.

Applying these principles to the case being considered, the recovery is fully warranted by the facts as they must have been found by the trial and appellate courts. The law applicable to the facts is stated with sufficient accuracy in the charge given by the court, and whether plaintiff was guilty of negligence by continuing to use the engine after the promise to make the repairs, was a question of fact, which the jury found for plaintiff, and since that finding has been affirmed by the Appellate Court it must be regarded as well found.

Only a single point more remains to be considered. The declaration contains an averment the machinery was out of order; that there was a promise to repair; that defendant failed to do so, and that the intestate, after such failure, was killed, and it is insisted there is a clear variance between the proof and the declaration in this respect. Such is not the case. There is evidence tending to show there was a promise to make repairs on the foot-board in the morning before the happening of the accident. A workman appeared for that purpose, and would no doubt have made the repairs had not the yard-master directed a postponement until twelve o'clock of that day, for the reason the engine could not be spared until that time. There was, therefore, no variance between the proof and the declaration.

No error appearing that affects the merits of the case, the judgment of the Appellate Court will be affirmed.

Judgment affirmed.

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**THE CALUMET IRON AND STEEL COMPANY v.  
MARTIN, ADM'X.***Supreme Court, Illinois, November, 1885.*

[Reported in 115 Ill. 358.]

**FIREMAN KILLED BY EXPLOSION OF BOILER — DEFECTIVE APPLIANCE — KNOWLEDGE OF DEFECT — DUE CARE BY EMPLOYEE — INSTRUCTION — COMPARATIVE NEGLIGENCE.** — In an action to recover damages for the death of plaintiff's intestate, a fireman in defendant's employ, who was killed by the explosion of a certain boiler in the possession and control of defendant, the same being out of repair, the jury were instructed to the effect that if plaintiff's intestate was in the employ of defendant as fireman, and while in the discharge of his duties as such fireman, using ordinary care and prudence for his safety, he was killed by the explosion of the boiler, and if such explosion was caused by defendant's negligence in allowing the boiler to be and remain in an unsafe and defective condition which was known, or could by reasonable care have been known by defendant, then the verdict should be for plaintiff. *Held*, that such instruction was properly given, and was not open to the objection that it ignored the rule as to comparative negligence (1).

**COMPARATIVE NEGLIGENCE — DOCTRINE ABROGATED.** — The rule of comparative negligence is exhaustively discussed in the opinion of Scholfield, J., with the citation of numerous authorities, and the rule formerly prevailing in Illinois was held to be abrogated.

**APPEAL** from the Appellate Court for the First District; heard in that court on appeal from the Superior Court of Cook county. The case is stated in the opinion. *Judgment for plaintiff affirmed.*

FLOWER, REMY & GREGORY, for appellant.

MONROE & LEDDY, for appellee.

**Scholfield, J.** — This is an appeal from the judgment of the Appellate Court for the First District, affirming a judgment of the Superior Court of Cook county, in an action on the case brought by appellee against appellant.

Appellant operated iron and steel works at Cummings, in Cook county, and appellee's intestate, at the time of receiving the injuries whereof he died, was in its employ as a fireman. His duties were to assist in keeping up the fires under the boilers, of which there were eighteen, constituting a battery, and in cleaning

1. The doctrine of comparative negligence, first announced in *Galena & Chicago Union R. Co. v. Jacobs*, 20 Ill. 478, 11 Am. Neg. Cas. 389, and followed throughout a long line of cases, is now abrogated in the State of Illinois. See *Calumet Iron & Steel Co. v. Martin*, 115 Ill. 358 (the case at bar); and also note in 2 Am. Neg. Cas. 646-647.

them. One-half of the boilers were cleaned each Sunday. They were connected with a steam-drum, which they supplied with steam, and from which steam was furnished to the engines. Boilers 1 and 2 were furnished with a connection direct with the steam-pumps, so that when the other boilers were not making steam, these two, or either of them, could be used to run the pumps. This connection communicated with the steam-drum, although there was a valve which shut off such communication, when closed. There was also, on each of boilers 1 and 2, a valve which shut off the access of steam to this connection for running the pumps. That valve was usually controlled by an eight-inch wheel, but this was broken off. The valve was opened and closed, after the wheel was broken off, by a pair of "pipe-tongs." Under each mud-drum was an escape valve, through which the boilers were blown off. The valve controlled by the wheel which was broken off was not closed, but was thought to have been closed by Flaherty, the foreman. On Sunday morning, October 1, 1882, the foreman, Flaherty, ordered appellees' intestate and one Lee to clean out certain boilers which had been previously marked or chalked by Flaherty for that purpose. They were proceeding to obey the order, and while they were in the act of taking off the head of the mud-drum of boiler No. 1, an explosion occurred, seriously injuring them both. The intestate died in consequence, within a few hours. The cause of the explosion was the escape of steam through the valve controlled by the broken wheel. The valve under the mud-drum was found closed, after the explosion. The master mechanic of appellant was notified of the broken wheel a week or more before the explosion, but neglected to repair it until afterwards. Three reasons are urged why, on the facts, there should be no recovery:

First. The proof is that the broken wheel in nowise contributed to the accident, because the valve could be managed just as well with tongs, and failure to close it was due to negligence of Flaherty, a co-employee with deceased, or to inevitable accident.

Second. The wheel had been broken off for a week or over, was in plain sight when on, and its absence must have been perfectly apparent to deceased. He took the risk, therefore, in not objecting or refusing to work with it in that condition. If he was ignorant of this defect, it was for appellee to plead and prove that fact.

Third. It was contributory negligence of the grossest character

for deceased to close the escape valve under the mud-drum, or to attempt to take off the mud-drum head, when the escape of steam through this valve warned him that he ran some risk in working on that boiler while there was yet steam in it.

There is, in our opinion, evidence in the record tending to support the opposite of each of these contentions, so that the questions were sufficiently before the jury for their determination, and we are therefore relieved, by the judgment of the Appellate Court, from giving them further consideration. Chicago & Alton R. Co. *v.* May, Adm'x, 108 Ill. 288; Missouri Furnace Co. *v.* Abend, 107 Ill. 44, 14 Am. Neg. Cas. 250, *ante*; Peoria & Pekin Union R'y Co. *v.* Clayberg, Admr., 107 Ill. 644; Chicago, B. & Q. R. Co. *v.* Bell, 112 Ill. 360 (1).

As pertinent to the question presented by the third of these reasons, counsel for appellant asked the court to instruct the jury as expressed in his second instruction, not including what is printed in italics, but the court modified it by adding what is printed in italics, and in this form gave it to the jury, it then reading thus:

"Again, if you find, from the evidence, that the accident in question would not have occurred if the escape valve under the mud-drum had been open, *and that it ought to have been open*, and that it was, in fact, *improperly* shut, either through the negligence of Flaherty, or of Martin or of Lee, and that this was the cause of the accident, then plaintiff cannot recover."

Counsel for appellant contend that the modifications of the court "were unnecessary and erroneous, directing the attention of the jury to misleading considerations of morals or propriety, apparently difficult for anybody to understand as applied to this case." Conceding that the modifications were not necessary, still it does not follow that making them was such an error as would authorize a reversal. They but express what was before implied. There is no "consideration of morals" involved. A jury, we think, would understand by the words, "and that it ought to have been open," that the duty of the foreman, or the intestate and Lee, was to have seen that it was open; and the word "improperly," correctly applies to keeping a valve shut when duty required it to be kept open.

1. The cases cited herein are reported with the Illinois cases in this volume of AM. NEG. CAS., *post*.

The first instruction given at the instance of appellee is as follows:

"The court instructs the jury that if they shall believe, from the evidence, that on or about October 1, 1882, the plaintiff's intestate, Patrick Martin, was in the employ of the defendant company as fireman, and that while in the discharge of his duty as such fireman, he was using ordinary care and prudence for his personal safety while he was so employed, and that he was injured and killed by reason of the explosion of a certain boiler in the possession of and under the control of the defendant company, as alleged in the declaration; and if the jury shall further believe, from the evidence, that the explosion of said boiler was caused by negligence of the defendant company in allowing one of the wheels which controlled one of the valves of said boiler to be and remain broken off, so that the valve could not be operated properly with safety, and allowing the same to be and remain in an unsafe and defective condition to be used and operated with safety (if the same was so defective), and that the defendant company had actual knowledge of such defective condition (if the jury believe, from the evidence, it was so defective), or would, by the exercise of reasonable care and caution have discovered such defective condition, then the verdict should be for the plaintiff, if he left the widow and children surviving him, as alleged in the declaration, and she took out letters of administration, as therein alleged."

Counsel for appellant contend this is erroneous, because, first, it assumes the defendant was guilty of actionable negligence in failing to put a new wheel upon the valve through which the steam escaped into the boiler; and, secondly, the evidence in the record tends strongly to charge the intestate with contributory negligence; yet the jury are told that if the intestate used ordinary care and prudence, the plaintiff can recover if the accident was due to the negligence of the company, instead of telling the jury that the plaintiff could recover only in the event that the negligence of the intestate was slight, and that of the defendant gross, in comparison with each other. Neither contention is tenable.

First. Nothing that was contested upon the trial is assumed in the instruction. The fact that "one of the wheels which controlled one of the valves of the boiler" that exploded, was, at the time of the explosion, and that for some time prior it had

been, broken off, was admitted on the trial by both sides, and is conceded as a fact in the instructions asked and given at the instance of appellant. Whether negligence in allowing that wheel to be and remain broken off caused the explosion, and whether appellant had actual knowledge of the fact of the wheel being broken off, or would, by the exercise of reasonable care and caution, have discovered such fact, are fairly left to be determined by the jury from the evidence.

Second. The ground of the second contention is thus stated by counsel: "It is now the settled law of this court that a man may exercise ordinary care, and yet be guilty of slight negligence. Therefore, consistently with the hypothesis of ordinary care and prudence on the part of the deceased, contained in this instruction, slight negligence might be imputed to him. If so, there could be no recovery, unless the negligence of appellant was gross in comparison with that of deceased, slight negligence not being inconsistent with ordinary care. To instruct the jury that if the deceased observed ordinary care, there might be a recovery if his death was due to appellant's negligence, is to say that if deceased was guilty of slight negligence, there might be a recovery if defendant was guilty of negligence. This, as will appear, is not the law. In such case there could be a recovery only if defendant was guilty of gross negligence." Counsel are hardly in a position to raise this objection, for in their first instruction they induced the court to give the law to the jury in the identical language which they thus contend is erroneous. That instruction is as follows:

"The negligence alleged against the defendant by plaintiff is a failure to keep in safe condition, or repair properly, machinery. If you should find, from the evidence and under the instructions of the court, that the accident shown in evidence occurred through the fact that the wheel operating the valve was broken, and that this was the direct cause of the accident, and that the defendant's agent or agents whose duty it was to repair this wheel were guilty of negligence in failing promptly so to do, and that Martin, the deceased, was injured without negligence on his part, and while exercising due care, then it is true that the defendant would be liable; but, on the contrary, should you find, from the evidence, that the accident did not occur from the fact that the wheel was broken, but that the valve, by due care, might be closed by other appliances, and that it was not so

closed, either through lack of due care on the part of Flaherty, or owing to a 'scale' or other mechanical obstruction in the valve, which causes would have the same effect had the wheel not been broken, then there can be no recovery here."

If the language was erroneous in one instruction it was erroneous in the other; but its mere repetition, it would seem clear, could not aggravate the error. The rule is reasonable, and recognized by previous decisions of this court, that a party cannot assign for error a ruling made at his own instance. (*Northern Line Packet Co. v. Binninger*, 70 Ill. 571.) But in order that misapprehension may be avoided in the future, we shall waive this answer, and assume that the question discussed by counsel is properly before us for consideration.

The error in the contention formulated in the language of counsel, which we have quoted, is in the assumption that the comparative relation of the negligence of the person observing due — *i. e.*, ordinary — care for his personal safety, and of the negligence of the person causing him injury, is not that of slight and gross, within the rule announced in *Galena & Chicago Union R. Co. v. Jacobs*, 20 Ill. 478, 11 Am. Neg. Cas. 389, and maintained in other cases governed by the ruling in that case. Within the contemplation of that rule, where one has observed ordinary care with reference to the particular circumstances involved, for his personal safety, he has, even if slightly negligent, observed all the care the law requires of him; and where, having observed this care, he is injured by the negligence of another, that other has been guilty of the degree of negligence for which the law charges responsibility. The injured person could do no more to entitle himself to redress, and no higher degree of culpability is essential to the liability of the person causing the injury, and so the two degrees of negligence, if the person observing ordinary care has been at all negligent, when compared with each other, fall within the opposite extremes of negligence, legally considered. Without attempting to demonstrate the entire accuracy of this, we content ourselves with showing that it is within the meaning of the court, as disclosed by the opinions in the cases to which we have referred, and in other cases to which we shall hereafter refer.

From the earliest reported case in our Reports, where the question was passed upon, to the present time — a period of more than thirty years — the general rule has been declared, and

recognized in opinions announced from time to time, that in order to recover for injuries from negligence it must be alleged and proved that the party injured was, at the time he was injured, observing due or ordinary care for his personal safety. Aurora Branch R. Co. *v.* Grimes, 13 Ill. 585; C. & M. R. Co. *v.* Patchin, 16 Ill. 198; Dyer *v.* Talcott, 16 Ill. 300; Galena & C. U. R. Co. *v.* Yarwood, 17 Ill. 509, 9 Am. Neg. Cas. 208; C., B. & Q. R. Co. *v.* Dewey, Admr., 26 Ill. 255; C., B. & Q. R. Co. *v.* Hazard, 26 Ill. 373; Ill. Cent. R. Co. *v.* Simmons, 38 Ill. 242; Chicago & A. R. Co. *v.* Gretzner, 46 Ill. 74, 11 Am. Neg. Cas. 427; Ill. Cent. R. Co. *v.* Weldon, 52 Ill. 294; Ill. Cent. R. Co. *v.* Schultz, 64 Ill. 177; C., B. & Q. R. Co. *v.* Van Patten, 64 Ill. 510, 11 Am. Neg. Cas. 431n; C., B. & Q. R. Co. *v.* Lee, 68 Ill. 579, 11 Am. Neg. Cas. 431n; Toledo, W. & W. Ry. Co. *v.* McGinnis, 71 Ill. 346; Ill. Cent. R. Co. *v.* Godfrey, 71 Ill. 507, 11 Am. Neg. Cas. 434n; Ill. Cent. R. Co. *v.* Hall, 72 Ill. 222; G. T. M. & T. Co. *v.* Hawkins, 72 Ill. 388; Chicago & A. R. Co. *v.* Becker, Admr., 76 Ill. 31; T., W. & W. R. Co. *v.* Jones, 76 Ill. 315; Ohio & M. R. Co. *v.* Stratton, 78 Ill. 88, 2 Am. Neg. Cas. 602; Chicago & N. W. Ry. Co. *v.* Hatch, 79 Ill. 137; C., B. & Q. R. Co. *v.* Harwood, 80 Ill. 88; C., B. & Q. R. Co. *v.* Damerell, 81 Ill. 450; Ill. Cent. R. Co. *v.* Green, 81 Ill. 19, 2 Am. Neg. Cas. 608; Kepperly *v.* Ramsden, 83 Ill. 354; Ill. Cent. R. Co. *v.* Lutz, 84 Ill. 598, 2 Am. Neg. Cas. 613; Ind. & St. L. R. Co. *v.* Evans, 88 Ill. 63; Toledo, W. & W. Ry. Co. *v.* Grable, 88 Ill. 441; C., B. & Q. R. Co. *v.* Harwood, 90 Ill. 425; Austin, Admx., *v.* C., R. I. & P. R. Co., 91 Ill. 35; Chicago & A. R. Co. *v.* Pennell, 94 Ill. 448; W. R'y Co. *v.* Elliott, 98 Ill. 481; City of Joliet *v.* Seward, 99 Ill. 267; City of Bloomington *v.* Perdue, 99 Ill. 329; Schmidt *v.* Sinnott, 103 Ill. 160; C., B. & Q. R. Co. *v.* Johnson, Admx., 103 Ill. 512; City of Bloomington *v.* Chamberlain, 104 Ill. 268; City of Chicago *v.* Stearns, 105 Ill. 554; Lake Erie & W. R'y Co. *v.* Zoffinger, 107 Ill. 199; Missouri Furnace Co. *v.* Abend, Admr., 107 Ill. 44, 14 Am. Neg. Cas. 250, *ante*; C., B. & Q. R. Co. *v.* Warner, 108 Ill. 538; C., B. & Q. R. Co. *v.* Avery, 109 Ill. 314; W., St. L. & P. R'y Co. *v.* Wallace, 110 Ill. 114; Myers, Admx., *v.* Ind. & St. L. R'y Co., 113 Ill. 386 (1).

<sup>1.</sup> The majority of the cases cited (wise stated) with the Illinois cases in herein are reported (except where other- this volume of AM. NEG. CAS.

The necessary implication, from the rulings in these cases, obviously is, that where a party, while observing due or ordinary care for his personal safety, is injured by the negligent acts of another, there may be a recovery on account of such negligent acts, and in some cases this is expressly ruled. Thus, in *Ill. Cent. R. Co. v. Schultz*, 64 Ill. 177, the court said: "Ordinary diligence only was required of the plaintiff, to avoid the injury, and the liability of the company would then be fixed if it was guilty of negligence." In *Ill. Cent. R. Co. v. Godfrey*, 71 Ill. 507, 11 Am. Neg. Cas. 434n, the court again said: "Where both parties are equally in the position of right, which they hold independent of the favor of each other, the plaintiff is only bound to show that the injury was produced by the negligence of the defendant, and that he exercised ordinary care or diligence in endeavoring to avoid it." And in *Lake Erie & W. R'y Co. v. Zoffinger*, 107 Ill. 199, it was said: "There is evidence tending to show plaintiff was struck by the cars being moved by defendant, at or on the crossing of Howard street; that the train was being run at an unusual rate of speed; that no bell was rung or whistle sounded; that there was no light on the forward car that struck plaintiff, and that plaintiff was observing due care for his safety." And by these facts, said the court, "a clear case is made in favor of plaintiff, where a recovery is fully justified." In *Schmidt v. Sinnott*, 103 Ill. 160, the declaration alleged "proper care" on the part of the plaintiff and negligence on the part of the defendant, resulting in injury to the plaintiff. Under the plea of not guilty, it was held these allegations were put in issue, and a judgment for the plaintiff was sustained, the court holding that the allegation of "proper care" was equivalent to an allegation of "ordinary care." And in *Myers v. Ind. & St. L. R'y Co.*, 113 Ill. 386, which was an action for negligence, resulting in the death of the plaintiff's intestate, who was fatally injured while in the employ of the defendant as a section-hand engaged in repairing its track, the court said: "In order to recover for an injury of this character, the person injured must exercise ordinary care to avoid danger, and those in charge of the train must be proven to have been negligent in the management of the train."

It inevitably follows, from the rulings in the numerous cases to which we have referred, that the court has not understood that the rule of comparative negligence changed or modified the

general rule requiring that the injured party, in order to recover for the negligence causing his injury, must have observed due or ordinary care for his personal safety, and authorizing him to recover for such injuries where he has observed such care. And it will be quite apparent that it was not intended by the judges who decided the Jacobs case, and the earlier cases following the ruling in that case, that the rule of comparative negligence, as then announced, was to have that effect, by reference to those cases and to different expressions of opinions by those judges. When the Jacobs case (20 Ill. 478) was decided, Judges Breese, Caton and Walker were the members of the court. The opinion in that case was prepared by Mr. Justice Breese. In that opinion he not only refers, without any expression of dissatisfaction, to Aurora Branch R. Co. *v.* Grimes, 13 Ill. 585, but quotes the following from the opinion in that case as a correct exposition of the law: "Where both parties are equally in the position of right, which they hold independent of the favor of each other, the plaintiff is only bound to show that the injury was produced by the negligence of the defendant, and that he exercised ordinary care and diligence in endeavoring to avoid it, or that by the exercise of ordinary care he could not have avoided it." And, then, after quoting from Dyer *v.* Talcott; C. & M. R. Co. *v.* Patchin; Galena & C. U. R. Co. *v.* Fay; Great Western R. Co. *v.* Thompson; C. M. T. R. Co. *v.* Rockafellow; Ill. Cent. R. Co. *v.* Reedy; City of Chicago *v.* Reedy; City of Chicago *v.* Major; previously decided by this court, the opinion proceeds: "The rulings of other courts, British and American, do not essentially differ from these, as will be perceived by reference to them as cited by the court. In addition to the cases cited, reference may, with propriety, be made to 2 Chipman (Vt.), 128; 2 Pick. (Mass.) 621; 12 Pick. 177; 6 Cowen (N. Y.), 180; 4 Mass. 422; 2 Taunton, 314 — all proceeding on the ground not only that the defendant was guilty of negligence, but that the plaintiff exercised ordinary care — and throwing the *onus* in each aspect upon the plaintiff." After this, the opinion proceeds with an analysis of what are assumed to be the leading cases in England, and in several of the States of the Union, upon the question of contributory negligence, and, in concluding, uses this language:

"It will be seen, from these cases, that the question of liability does not depend absolutely on the absence of all negligence on the part of the plaintiff, but upon the relative degree of care or

want of care, as manifested by both parties, for all care or negligence is at best but relative, the absence of the highest possible degree of care showing the presence of some negligence, slight as it may be. The true doctrine, therefore, we think, is, that in proportion to the negligence of the defendant should be measured the degree of care required of the plaintiff — that is to say, the more gross the negligence manifested by the defendant, the less degree of care will be required of the plaintiff to enable him to recover. Although these cases do not distinctly avow this doctrine in terms, there is a vein of it, very perceptible, running through very many of them, as, where there are faults on both sides, the plaintiff shall recover, his fault being to be measured by the defendant's negligence; the plaintiff need not be wholly without fault, as in *Raisin v. Mitchell*, 9 C. & P. 613, and *Lynch v. Nurdin*, 1 Ad. & E. 29 (1). We say, then, that in this, as in all like cases, the degrees of negligence must be measured and considered, and whenever it shall appear that the plaintiff's negligence is comparatively slight and that of the defendant gross, he shall not be deprived of his action."

Thus, it is seen no previous decision of this court was assumed to be overruled. No new doctrine was claimed to be announced, but the rule declared was, in effect, claimed to be sanctioned by the spirit and philosophy of the cases reviewed, though not strictly within their letter. Afterwards, in *C., B. & Q. R. Co. v. Hazzard*, 26 Ill. 373, 2 Am. Neg. Cas. 543, Mr. Justice Breese, delivering the opinion of the court, at page 385, said: "We endeavored, in the case of the Galena & C. U. R. Co. v. Jacobs, 20 Ill. 478, 11 Am. Neg. Cas. 389, by a review of all the American and English cases relating to negligence, to lay down some rules

1. In *Lynch v. Nurdin*, 1 Ad. & El., N. S., 29 (1814), it appeared that defendant negligently left his horse and cart in the street unattended. Plaintiff, a child seven years old, got upon the cart to play; another child incautiously led the horse on and plaintiff was thereby thrown down and hurt. Held, that defendant was liable in an action on the case, though plaintiff was a trespasser, and contributed to the injury by his own act; and that the question was properly left to the jury whether defendant's conduct was neg-

ligent, and the negligence caused the injury.

*Raisin v. Mitchell*, 9 C. & P. 613, was an action for damages for injury to plaintiff's sloop. The jury gave a verdict for plaintiff for half the damage proved, and, in reply to a question as to how the verdict was arrived at, stated, that in their opinion, both plaintiff and defendant were at fault. Held, that plaintiff was entitled to the verdict, notwithstanding there was fault on his part, as such fault was not such as to prevent his recovery.

by which it is to be adjudged. Among others, we there said, to maintain an action for negligence there must not only be fault on the part of the defendant, but ordinary care on the part of the plaintiff must be shown. Neither of these elements is found in this case." In C., B. & Q. R. Co. *v.* Cauffman, 28 Ill. 513, the opinion was by Caton, J., holding that if a party is guilty of negligence or the want of ordinary care, and allows stock to run in a highway near a railway crossing, he cannot recover for injuries received by such stock. In Ill. Cent. R. Co. *v.* Simmons, 38 Ill. 242, Mr. Justice Breese contended that a declaration in an action for injuries resulting from negligence, in which it was not averred that the plaintiff observed proper care, was bad on motion in arrest, but the majority of the court overruled him, holding that if it was error, it was cured by verdict. In Chicago & A. R. Co. *v.* Gretzner, 46 Ill. 74, 11 Am. Neg. Cas. 427, the opinion of the court was by Mr. Justice Breese. In that opinion, on page 83, after referring to the Jacobs and Hazzard cases, and to Dewey's case, he says: "These cases establish the doctrine of comparative negligence, and hold there must be fault on the part of the defendant, and no want of ordinary care on the part of the plaintiff, and where there are faults on both sides, the plaintiff may, in some cases, recover — as, where it appears his negligence is slight and that of the defendant gross." Again, in C. & N. W. R. Co. *v.* Sweeney, 52 Ill. 327, the opinion was also by Mr. Chief Justice Breese, and in discussing the questions presented, referring to Gretzner's case, *supra*, he said: "In the case of Chicago & A. R. Co. *v.* Gretzner, 46 Ill. 74, 11 Am. Neg. Cas. 427, the question of comparative negligence was again discussed, and it was said, to render a railroad company liable there must be fault on their part, and no want of ordinary care on the part of the plaintiff, and when both parties are in fault, the plaintiff may, in some cases, recover — as, when it appears his negligence is slight and that of the defendant gross." In C., B. & Q. R. Co. *v.* Dewey, 26 Ill. 255, Walker, J., in delivering the opinion of the court, said: "Each party must employ all reasonable means to foresee and prevent injury." And again: "Whilst the party upon whom the injury is inflicted must use all reasonable care, he is not held to the highest degree of precaution of which the human mind is capable; nor to recover need he be wholly free from negligence, if the other party has been culpable." In Chicago & A. R. R. Co. *v.* Pondrom, 51 Ill.

333, at page 337 (9 Am. Neg. Cas. 233), the same judge, in delivering the opinion of the court, alluding to the doctrine of comparative negligence, and that held by other courts, said the difference was more apparent than real. Again, in C. & N. W. R'y Co. v. Ryan, 70 Ill., at page 213, Mr. Justice Walker, in delivering the opinion of the court, among other things said: "It is undoubtedly the duty of all persons who undertake to cross a railroad track to act with caution and prudence, because it is apparent that such crossings are always more or less dangerous. This being the case, those who desire to cross must use every reasonable precaution to avoid an accident, and if they fail to do this, no recovery can be had for an injury which might have been averted by the exercise of ordinary care." And again, in T., W. & W. R'y Co. v. McGinnis, 71 Ill., at page 347, Mr. Justice Walker, in delivering the opinion of the court, after stating that the rule of comparative negligence is the settled law of this court, added: "The rule is, no doubt, a modification of the language of the earlier decisions of this court, although not in fact a material modification of the common-law principle. Where courts state the rule differently, they hold where the negligence of a plaintiff is slight and that of the defendant gross, that plaintiff's negligence did not contribute materially to the injury."

The position contended for by appellant is, in substance, that where one party is injured by the negligence of another, in order to recover therefor the party injured must prove that he exercised more than ordinary care — that is to say, the highest degree of care. This has no sanction in any authority of which we are aware. Expressions may be found in opinions in a few cases to which we have made no reference, not in entire harmony with what we have quoted from opinions, *supra*. These expressions occur, in the main, in the argument of the opinion, and we do not now recall any case in which they actually controlled the decision of the case. They are, however, in any view, exceptional, and inaccurate as expressions of the law, and to be considered as overruled.

There was, therefore, no error in the instruction as given. If either party had felt it to be necessary to have gone further, and explained to the jury that ordinary care does not exclude the idea of all negligence, however slight, but that the plaintiff was entitled to recover, notwithstanding the intestate might have been slightly negligent, provided the defendant was guilty of

negligence which, in comparison with it, was gross, the court should have been requested to so instruct the jury. Such an instruction might, without impropriety, have been given. It was not indispensable.

The only remaining ground urged for reversing the judgment below is, that the jury were instructed that in assessing the plaintiff's damages they should not assess the same above the amount claimed in the *ad damnum* of the declaration. It does not appear, from the amount of the verdict or otherwise, that this instruction affected the action of the jury. While it is certainly censurable, it will not justify a reversal of the judgment. C., B. & Q. R. Co. v. Payne, Admr., 59 Ill. 534; Ind. & St. L. R. Co. v. Estes, 96 Ill. 470.

The judgment is affirmed.

**EMPLOYEE INJURED WHILE UNLOADING CARS — COLLISION — FELLOW-SERVANTS.** — In **NORTH CHICAGO ROLLING MILL COMPANY v. JOHNSON**, 114 Ill. 57 (*May, 1885*), judgment for plaintiff in the Circuit Court of Cook county, affirmed in Appellate Court for First District, was *affirmed*. It appeared from the opinion rendered by SCHOLFIELD, Ch. J., that: "Appellant was possessed of a rolling mill, and other works connected with it, and of adjoining yards, upon which were railway tracks used for the movement of cars belonging to appellant and to other parties with whom it did business, under the management and control of employees of appellant. Appellee was in the employ of appellant as a common laborer, and had been, for about one month, engaged in removing rails from its mill and placing them upon cars, though it was within the line of his duty to unload bricks from cars, and, in general, to perform any common labor required of him in and about the mill. He was under the immediate charge and control of one Clute, assistant foreman of the rail-mill. He and a number of co-laborers were directed by Clute to unload the bricks from a car standing on one of the appellant's tracks near the rolling-mill, which they were proceeding to do, when, before they had quite finished the work, a train of cars was backed down the track on which the car they were unloading was standing, and against that car with such violence as to suddenly put it in motion, and thereby to knock appellee down and break his leg, and otherwise seriously injure him. The train causing this injury was under the immediate charge and control of one Crowley, appellant's yard-master, and neither Clute had any charge or control of the men operating the train, nor Crowley any charge or control of appellee and the other

men engaged in unloading the bricks. \* \* \* After discussing appellant's objections to certain instructions the court said (on the question of fellow-servant rule):

" Objection is also urged that the court erred in refusing to give the seventh in the series of instructions asked by the appellant. It read as follows:

" ' If the jury believe, from the evidence, that plaintiff's usual employment at and before the time of the injury was to load and unload cars in the defendant's yard, and that it was the usual duty of those having control of the train in question to move cars in said yard before and after being unloaded, and that the plaintiff, and those having control of said train, whilst engaged in their respective employments could observe how each did their work, then the said plaintiff and the persons having control of said engine were co employees.'

" This falls short of an accurate statement of what is essential to constitute a co-employee, within the ruling in Chicago & N. W. R'y Co. v. Moranda, 93 Ill. 302; Chicago & A. R. Co. v. May, Admx., 108 Ill. 288, and Chicago & Eastern Ill. R. Co. v. Geary, 110 Ill. 383. That ruling requires that the servants of the same master, to be co-employees, so as to exempt the master from liability on account of injuries sustained by one resulting from the negligence of the other, shall be directly co-operating with each other in a particular business — *i. e.*, the same line of employment — or that their usual duties shall bring them into habitual association, so that they may exercise a mutual influence upon each other promotive of proper caution. The idea is, that the relations between the servants must be such that each, as to the other, by the exercise of ordinary caution, can either prevent or remedy the negligent acts of the other, or protect himself against its consequences; and, of course, where there is no right or no opportunity of supervision, or where there is no independent will, and no right or opportunity to take measures to avoid the negligent acts of another without disobedience to the orders of his immediate superior, the doctrine can have no application. How can the laborer be profited by a knowledge of the usual manner of doing work in another department, if he is unable, in any reasonable way, while engaged in the proper discharge of his duties, and without disobedience to his immediate superiors, to influence the conduct of the laborers in that department? The instruction was properly refused."

*Switchman struck by wall near track — Contributory negligence.*

In NORTH CHICAGO ROLLING MILL COMPANY v. MORRISSEY, 111 Ill.

646 (*November, 1884*), switchman in defendant's employ while riding on locomotive struck by a wooden wall in close proximity to track and thrown therefrom and killed, judgment for plaintiff for \$4,000 in the Superior Court of Cook county, affirmed in Appellate Court for the First District, was *reversed* for error in instruction ignoring the question of contributory negligence, and on question of damages.

*Employee injured in attempt to stop loaded car — Master not liable.*

In *SACK v. DOLESE ET AL.*, 137 Ill. 129 (1891), where plaintiff was working in defendant's stone quarry and while attempting to stop a loaded car the brake gave way in some manner and he was thrown to the ground and the car ran over and crushed the fingers of one hand and also injured his feet, judgment of the Appellate Court for the First District, affirming judgment for defendants in the Superior Court of Cook county, was *affirmed*, it being *held* that the facts did not warrant a presumption of negligence on defendant's part. See also 35 Ill. App. 636.

*Employee injured by truck — Contributory negligence.*

In *WERK v. ILLINOIS STEEL CO.*, 154 Ill. 427 (1895), the syllabus to the official report (paragraph 2) states the case as follows: "An employee engaged in turning up a ladle used for carrying molten iron upon a railroad track, is guilty of contributory negligence which will defeat his recovery for injuries sustained in placing his foot upon the rail near the truck wheels, when he knows the truck may, at any moment, be moved by an engine coupling to trucks upon the same track, there being a safe place in which he could stand while performing his work." 54 Ill. App. 302, *affirmed*. In the Superior Court of Cook county plaintiff's damages were assessed at \$256 (action for two injuries, and the judgment was for the first, but on the second the court directed finding for defendant), which was *affirmed* by the Appellate Court for the First District (54 Ill. App. 302). As to the second cause of injury, the foregoing ruling sufficiently states the case.

## THE UNITED STATES ROLLING STOCK COMPANY v. WILDER.

*Supreme Court, Illinois, January, 1886.*

[Reported in 116 Ill. 100.]

**INSTRUCTIONS MUST BE BASED UPON EVIDENCE.** — All instructions to a jury should be based upon evidence from which it legally and logically results, and it is error to refuse an instruction which announces a mere abstract proposition of law not suggested or warranted by the evidence in the case. On the other hand, it is error to give such an instruction where the giving of it will have a tendency to mislead the jury. If, however, the reviewing court is able, from the nature of the case to say that it had no such tendency then, though improperly given, it will afford no ground of reversal.

**CONTRIBUTORY NEGLIGENCE — BURDEN OF PROOF — INSTRUCTION.** — Where plaintiff established a *prima facie* right of recovery by proving the facts alleged in his declaration without disclosing any negligence on his part, it devolved upon the defendant to prove, by way of defense, or at least to offer some evidence tending to prove negligence on the part of the plaintiff, before the court would be warranted in giving an instruction relating to contributory negligence.

**EMPLOYEE MAY ASSUME THAT MASTER HAS USED REASONABLE CARE IN SELECTION OF SERVANTS.** — An employee is not bound to investigate and find out, at his peril, whether the common master has used reasonable care and prudence in the selection of those already employed in the same branch of service; he is warranted in assuming that the master has discharged his duty in this respect, and until notice to the contrary is brought home to the employee he may safely act upon that hypothesis.

**FELLOW-SERVANTS — INCOMPETENCY — ASSUMPTION OF RISK — EXTRA-HAZARDS — NOTICE.** — All that the law demands of such employee is that he keep his eyes open to what is passing before him, and avail himself of such information as he may receive with respect to the habits and characteristics of his fellow-servants; and if he finds one of them incompetent, so that his own position is extra-hazardous, it is his duty to notify the master, and if the latter refuses to discharge the incompetent or unfit fellow-servant, the complaining servant should quit the master's employment; if he does not, he will be deemed to have assumed the extra hazard of his position.

**ASSUMPTION OF RISKS — SPECIAL RISKS — DUTY OF MASTER.** — "A servant generally assumes only those risks of which he has express or implied notice. Some risks are so obvious that notice of them will be presumed. Where there are special risks, of which the employee is not, from the nature of the employment, cognizant, or which are not patent, it is the duty of the employer to notify him of such risks, and on failure of such notice, if the employee is hurt by exposure to such risks, he is entitled to recover from his employer."

**MACHINERY AND APPLIANCES — FELLOW-SERVANTS — EXTRA-HAZARDS — LIABILITY OF MASTER FOR FAILURE TO PERFORM DUTY.** — While negligence of a fellow-servant is one of the ordinary risks which an employee assumes when entering into the service of another, yet the risk is subject to the qualification that the master is not to knowingly employ or retain incompetent or habitually negligent servants, nor is he to permit to be used, in his business, defective machinery, whereby the ordinary dangers of the service will be enhanced. These extra-hazards, which result from the master's failure to perform his duties to his employees, do not come within the risks which the latter assume, and for an injury to a servant, resulting from extra-hazards, which are not obvious, and of which the servant has no notice, the master is liable.

In such case it is no answer to an action to say, as is alleged in this case, that the plaintiff might, by the exercise of proper diligence, have ascertained that the defendant was conducting his business in disregard of a positive duty which he owed to the plaintiff as his servant.

**APPEAL** from the Appellate Court for the First District; heard in that court on appeal from the Superior Court of Cook county. *Judgment affirmed.*

"This action was brought in the Superior Court of Cook county, by Conrad Wilder, the appellee, against the United States Rolling Stock Company, the appellant, to recover damages for the loss of the plaintiff's hand, which is alleged to have been occasioned by the negligence of the company in retaining in its employ an incompetent and unskilful engineer, after notice of such unskilfulness and incompetency. There was a trial in the Superior Court on the merits, resulting in a verdict and judgment for plaintiff of \$5,000, which was affirmed by the Appellate Court for the First District, and the company brings the case here for review."

C. D. ROYS, WM. B. KEEF and J. C. HUTCHINS, for appellant.  
MARTIN BEEM and D. F. FLANNERY, for appellee.

**Mulkey, Ch. J.** This cause is now before us the second time for consideration. When first before us, the conclusion was reached that the Appellate Court properly affirmed the judgment of the trial court, and a short opinion was filed to that effect. A rehearing was subsequently granted on the ground some of the members of the court were in doubt as to whether the trial court did not err in striking out the concluding words of the defendant's fifth instruction. That instruction tells the jury there can be no recovery in the case "unless the jury find, from the evidence, that the engineer in charge of the locomotive was incompetent to perform such service, and that the defendant

company knew, or by reasonable diligence might have known, of such incompetency, and not even then unless you further believe, from the evidence, that the plaintiff did not know of such incompetency, *and did not have equal facilities with the defendant for acquiring such knowledge.*" After the words in italics were stricken out, the instruction thus modified was given to the jury, and it is contended this was error.

Conceding the instruction, as asked, to be correct as an abstract proposition of law, does it necessarily follow that it should have been given to the jury unless there was some evidence upon which to base it? It is an elementary principle of universal application, that all instructions to a jury should be based upon evidence from which it legally and logically results — that it is not error to refuse an instruction which announces a mere abstract proposition of law not suggested or warranted by the evidence in the case. On the other hand, it is error to give such an instruction where the giving of it will have a tendency to mislead the jury. If, however, where such an instruction is given, the reviewing court is able, from the nature of the case, to say that it had no such tendency, then, though improperly given, it will afford no ground for reversal. These several propositions have often been recognized by this court, and if it be possible to settle anything by judicial decisions, they must be regarded as the settled law of this court. Thus it is said in *Keeler v. Stuppe*, 86 Ill. 309: "The sole function of instructions is to give the law applicable to the case, in clear and intelligible language." Again, in *Baxter v. People*, 3 Gilm. 368, it is said: "The object of instructions is to convey to the minds of the jury correct principles of law as applicable to the evidence which has been laid before them. Nothing should be given them unless it will promote that object." So in *Atkinson v. Lester*, 1 Scam. 407, it is said: "Mere abstract propositions of law which do not refer to the evidence in the cause should not be given as instructions." But it is said in *Corbin v. Shearer*, 3 Gilm. 482, that a case will not be reversed "because of the giving of such instructions, unless it appears that they improperly influenced the jury." We might go on almost indefinitely citing cases in this court which fully sustain the propositions above stated, but it is not necessary to do so. We will simply refer in this connection to the following additional cases, which are directly in point: *McNair v. Platt*, 46 Ill. 211; *Lander v.*

People, 104 Ill. 248; Devlin *v.* People, 104 Ill. 504; Heaton *v.* Kemper, 2 Scam. 367; Nealy *v.* Brown, 1 Gilm. 10.

The defendant, it will be perceived, is charged with negligence in the selection and hiring of an incompetent engineer, and also in suffering and permitting such incompetent engineer to manage, control and operate its cars and engine. It was sufficient, under the pleadings, to entitle the plaintiff to recover, to prove negligence in either of the respects charged. Whatever may be said in respect to the first branch of the subject, the decided weight of evidence shows that Guernsey, the defendant's engineer, was incompetent, and that the defendant had, at the time of and during plaintiff's employment, notice of this fact. Guernsey was first employed by the defendant in the capacity of a truck repairer, and was promoted from that position to the more responsible one of engineer, upon his own recommendation. He entered the defendant's service in May or June, 1880, and the attention of the company was frequently called to his incompetency. It is true Cary, foreman, and Stagg, superintendent of the company, thought him competent for the position he occupied. As they were probably personally responsible to the company, both for his employment and retention, it is not a matter of surprise that they should so consider him. So far as Cary is concerned, he might safely say this, for he evidently thought his position required little or no skill, for in answer to the inquiry if it did not require as much skill to run the company's engine as any other, he says: "No, sir; I will say that it does not require any but an ordinary man. A very ordinary man can do it in our yard. \* \* \* A man that is competent to keep the water up, and keep his pumps going, can do our work." Without dwelling further upon the facts, we will add, in general terms, that the witnesses for the plaintiff make out a strong case of inexcusable negligence against the defendant in retaining Guernsey as engineer of the company.

It will be understood that in thus discussing the facts it is not for the purpose of reviewing the judgment of the lower court upon them, but with the sole view of presenting a conclusive reason why the judgment of that court should not be disturbed for any supposed technical error not affecting the merits, as another trial would in all probability result the same way.

Recurring now to the modification of the instruction complained of, let us examine with some particularity the grounds

upon which the action of the trial court in respect to it is assailed. The position of appellant, as we understand it, is, that the trial court should, by the instruction in question, have submitted to the jury the question whether the appellee, by the exercise of reasonable care and diligence, might have known or learned that the engineer was an incompetent person. Assuming this to be so, the question then arises, what evidence is there in the record that can with any degree of propriety be said to raise this question? — for it is to be borne in mind that no question should in any case be thus submitted which does not fairly arise out of the evidence. It is the true and proper function of the jury to determine what the evidence proves upon every question submitted to them, and if there is no evidence on a particular question involved in the pleadings, or raised by counsel in argument, it follows there would be nothing for the jury to consider or determine with respect to that particular question. Any instruction, therefore, relating to it would necessarily be nothing more than a mere abstract proposition of law, and for that reason should not be given.

The simple facts in this case, so far as they may be supposed to have even the remotest bearing upon the question under consideration, are, that at the time of the plaintiff's employment as switchman the defendant then had in its service an unskilful and incompetent engineer, which fact was well known to the defendant; that within the short space of six working days after his employment, the plaintiff, while acting with due care in the line of his duty, received a serious injury upon the hand, occasioned by the negligence and incompetency of the engineer, which, after appellee's submitting to two surgical operations, resulted in the loss of his hand. These are the facts — nothing added, nothing omitted. The appellant does not claim that the incompetency of the engineer was known, or might have been known, to appellee, by the exercise of ordinary care, and no evidence is offered to prove such a hypothesis, but, on the contrary, its claim is, that the engineer was competent, careful, skilful; and yet, strange to say, and inconsistently as it may appear, this court is asked to reverse the case because the trial court refused to submit the question to the jury, whether the plaintiff, by the exercise of reasonable diligence, might not have discovered the engineer's incompetency — a fact which the appellant itself earnestly maintains has no existence. If, as

appellant's witnesses swear, the fact had no existence, how could appellee, by any degree of care or watchfulness on his part, have discovered it? If there were any proof in the record tending to show that appellant, or any other person, prior to the time of the accident, informed appellee of the incompetency of the engineer, or if it appeared that the engineer had, during appellee's few days' service, been guilty of previous acts of negligence, from which the latter could have reasonably inferred the engineer's general incapacity, it might then with propriety be contended that the instruction, as originally drawn, should have been given. But there is absolutely nothing of this kind in the record. The plaintiff, by proving the facts above stated, without disclosing any negligence on his own part, as he clearly did, established a *prima facie* right of recovery. If, therefore, the plaintiff, as a matter of fact, was guilty of such contributory negligence as would defeat a recovery, it devolved upon the defendant to prove it, by way of defense, or at least to offer some evidence tending to prove it, before the court would have been warranted in giving an instruction relating to contributory negligence.

The contention of appellant, as we understand it, is, that where one is employed as an operative in a particular branch of service, he is bound to investigate and find out, at his peril, whether the common master has used reasonable care and prudence in the selection of those already employed in the same branch of service. The law imposes no such duty. One thus employed is warranted in assuming that the master has discharged his duty in this respect, and until notice to the contrary is brought home to the employee, he may safely act upon that hypothesis. All that the law demands of one thus employed is, that he keep his eyes open to what is passing before him and avail himself of such information as he may receive with respect to the habits and characteristics of his fellow-servants, and if, from either of these sources of information, he finds one of them, from incompetency or other cause, renders his own position extra-hazardous, it is his duty to notify the master, and if the latter refuses to discharge the incompetent or otherwise unfit fellow-servant, the complaining servant will have no alternative but to quit the master's employ. If he does not he will be deemed to have assumed the extra-hazard of his position thus occasioned. The case suggested, it will be perceived, is one of mutual negligence. On the part of the master, it is negligence to retain the derelict

servant in his employ. It is, on the other hand, negligence in the complaining servant to continue longer in the master's service unless he intends to assume the extra risk himself.

The authorities cited by appellant on this branch of the case are not at all in point. Thus, the case of Chicago, R. I. & P. R. Co. *v.* Clark, 108 Ill. 113, is given much prominence in counsel's argument. That was an action brought by Mrs. Clark against the company for negligently causing the death of her husband, who was in the employ of the company as a brakeman at the time of the accident which caused his death. The deceased, at the time, was making a coupling after night, in front of a platform near the side-track upon which the train was standing, and in doing so he became entangled with a lantern in his hand, which, coming in contact with the moving train, was so pressed up against him in his position between the cars and the platform, as to cause internal injuries from which he died. The negligence charged was, that the track was built too near the platform, the distance being only some ten inches. The negligence complained of in that case, assuming there was negligence was not at all, as is manifest, like the negligence charged in this. In that case the proximity of the track to the platform was open and visible to all persons having occasion to be there, and especially to brakemen on the road, and had so been for fourteen years past. Whatever danger resulted from the proximity of the track to the platform must necessarily have been as well known to the deceased as to the company or any of its officers, and hence there was no right of recovery (1). Here the facts are altogether different and call for the application of different principles. While that case was clearly decided properly, yet, as is not infrequently the case, there are things said in the opinion by way of argument that are not accurate when considered as abstract propositions, and they must therefore be confined to the particular facts then before the court. Thus, among other things, it is said in effect in that case, that the master is not required to inform his servant of dangers pertaining to

1. The facts in CHICAGO, ROCK ISLAND & PACIFIC R'Y CO. *v.* CLARK, Adm'x, 108 Ill. 113 (1883), are sufficiently stated in the case at bar, and hence it is deemed unnecessary to report the same in this volume of AM. NEG. CAS. Judgment for plaintiff in the Clark

case, on verdict rendered in the Circuit Court of Peoria county, which was affirmed by the Appellate Court for the Second District, was reversed by the Supreme Court. See 11 Bradw. (Ill. App.) 104.

his duties. This is true as to dangers which are obvious, and which the servant would necessarily see, as was the case there. It is also true of the ordinary dangers pertaining to a particular service, and which all persons who engage in it are presumed to know. But the statement is far from being universally true.

The true rule on this subject is well stated in Wharton on Negl., § 206. It is there said that a "servant generally assumes only those risks of which he has express or implied notice. Some risks are so obvious that notice of them will be presumed. Where there are special risks in an employment, of which the employee is not, from the nature of the employment, cognizant, or which are not patent in the work, it is the duty of the employer to notify him of such risks, and on failure of such notice, if he is hurt by exposure to such risks, he is entitled to recover from the employer." Now, while negligence of a fellow-servant is one of the ordinary risks which an employee assumes when entering into the service of another, yet this risk is subject to the qualification the master is not to knowingly employ or retain incompetent or habitually negligent servants; nor is he to permit to be used, in his business, defective machinery, whereby the ordinary dangers of the service will be enhanced. These extra hazards, which result from the master's failure to perform his duties to his employees, do not come within the risks which the latter assume as a part of their contract of service. For all such extra hazards resulting in injury to the servant, which are not obvious, and of which the servant has no notice, the master is liable. And in such case it is no answer to an action to say, as is alleged here, that the plaintiff might, by the exercise of proper diligence, have ascertained the defendant was conducting his business in disregard of a positive duty which he owed the plaintiff, as his servant. If in such case, however, an employee, after notice of the extra risks thus occasioned, continues in the master's service, it will be at his own peril, for the law, in such case, will presume that he intended to assume them, otherwise he would have quit the master's service. The law on this branch of the subject is well stated in the late case of *Stafford v. Chicago, B. & Q. R. Co.*, 114 Ill. 244 (1).

<sup>1.</sup> In *STAFFORD v. CHICAGO, BURLINGTON & QUINCY R. R. CO.*, 114 Ill. 244 (1885), switchman injured by alleged negligence of engineer in defendant's employ, plaintiff was held not entitled to recover, the court finding that the switchman and engineer were fellow-servants. *SCHOLFIELD, J.*, in

After availing ourselves of all the additional light afforded by the rehearing allowed in this case, we are satisfied with the conclusion heretofore announced in it, and also with the general views expressed in the opinion therein filed.

Judgment affirmed.

**MACHINERY BECOMING DISCONNECTED — EMPLOYER NOT LIABLE.** —In **RICHARDSON v. COOPER**, 88 Ill. 270 (1878), judgment for plaintiff for \$1,000 in the Circuit Court of Sangamon county was *reversed* on the ground that the evidence failed to sustain the verdict. The facts were as follows: Plaintiff was engaged, with another person in using a machine, in elevating a stone on the walls of the State house, and was injured by some part of the machine becoming disconnected. The court (per WALKER, J.) said: "Appellee [plaintiff below] was employed for the performance of no specific character of work, but did various kinds, as occasion required. Appellant was the contractor, and acted, in person, as the general superintendent of the building, and was at the building and had charge, in person, of the stone work at the time the accident occurred. The machine with which the stone was being hoisted appears to have been of sufficient material, properly constructed, and, at least, reasonably well adapted to the use for which it was designed; but, a short time previous to the accident, the men engaged in operating the machine discovered that it was not in order, and was not working properly, and had Cross, who had charge of the putting in place the iron-work at a

delivering the opinion, said: "We are Co. v. Troesch, 68 Ill. 545; Chicago & fully committed to the principles: Eastern Ill. R. Co. v. Geary, 110 Ill. 383.

"First. Where one servant is injured by the negligence of his fellow-servant, the duties of both being such as to bring them into habitual association, so that they may exercise an influence upon each other promotive of proper caution, and the master is guilty of no negligence in the employment of the servant causing the injury, the master will not be liable for the injury. **Chicago & N. W. R'y Co. v. Moranda**, 93 Ill. 302; **Chicago & Eastern Ill. R. Co. v. Geary**, 110 Ill. 383.

"Third. If a person, knowing the hazards of his employment as the business is conducted, voluntarily continues therein, without any promise of the master to do any act to render the same less hazardous, the master will not be liable for any injury he may sustain therein, unless, indeed, it may be caused by the wilful act of the master. **Simmons v. Chicago & Tomah R. Co.**, 110 Ill. 340; **Abend v. Terre Haute & Ind. R. Co.**, 111 Ill. 202, 11 Am. Neg. Cas. 421; **Missouri Furnace Co. v. Abend**, 107 Ill. 44, 14 Am. Neg. Cas. 250, *ante*; **Penn. Co. v. Lynch**, 90 Ill. 334." \* \* \*

"Second. If it be alleged the master is guilty of negligence in selecting or retaining an incompetent servant, the burden is on the plaintiff to prove it. **Columbus, Chicago & Ind. Cent. R'y** See also the STAFFORD case decision in 16 Bradw. (Ill. App.) 84.

different part of the building, to examine it. Appellee and the man engaged with him in operating the machine testify that Cross told them it was unsafe, but there was not time to fix it until after six o'clock, and to continue to use it, which they did, and appellee was injured whilst raising the next stone." \* \* \* "There is no claim that the fellow-servants were unskilful or wanted prudence; nor can it be urged, nor is it claimed, that this machine was not properly constructed, or that the material employed was not suitable. On the contrary, it was shown to have raised stones from ten to twelve times the weight of that which caused the accident." \* \* \* "From the evidence, appellant seems to have done all things his position as employer of appellee required of him," and upon this evidence there was no reason why appellant should be held in damages for the injury to appellee produced from unforeseen causes.

DANGEROUS MACHINERY — RISK OF EMPLOYMENT — EXTRA-HAZARDS — FAILURE OF MASTER TO WARN SERVANT. — In **THE McCORMICK HARVESTING MACHINE COMPANY v. BURANDT**, 136 Ill. 170 (1891), judgment for plaintiff in the Superior Court of Cook county, affirmed by the Appellate Court for the First District, was *affirmed*. The facts of the case are stated by GARY, J., in his opinion rendered in the Appellate Court as follows:

" This is an action by the appellee to recover damages for personal injury sustained by him while employed in the foundry of the appellants. The fact and manner of the injury and the amount of damages are not in question. The foundry was a building 300 feet long and 80 feet wide. Sunken in the floor of the foundry, extending from very near the center of the building each way to the ends, were three lines of 'conveyors' about thirty feet apart, and those nearest the sides of the building about thirteen feet therefrom. They consisted of troughs, which, when covered with two-inch plank, would be even or level with the floor, in which troughs were carried, by endless chains, iron plates, lozenge shaped, eight inches wide in the center, thirteen inches long, distant from each other eighteen inches. The bottoms of the troughs were shaped to fit the plates, which dragged by the chains through them, standing upright on the edge of one side, thereby conveying along the troughs the sand which was thrown into them. Across the troughs, four feet apart, were cross-pieces of three by four inches, let into the sides to lay the plank cover on, the bottom of which cross-pieces was two inches or a little more above the iron plates. About midnight, in February, 1888, the accident happened. The appellee had

worked in the foundry, sometimes of nights and sometimes day work, for two years. At the time he was injured he had been from three to ten nights (the testimony conflicts as to the time) attending to these conveyors, and the machinery by which they were operated. The testimony tends to show that from fifteen to thirty men were at work in the foundry of nights, and that these conveyors were without cover or protection while in use, except that at one place at the north end of the middle conveyor, in the north end of the building, there was a plank about ten feet long, which was intended to be kept in place as a cover. Whether that plank was in place as such cover at the time of the accident is disputed. The appellee testified that when he was set at this work he was instructed that if he was called to any part of the machinery he must go and walk as fast as he could; that he was reluctant to undertake the work, and tried to be relieved from it, as he did not understand that work much; that his superiors told him that he would have to attend to it temporarily. This reluctance of the appellee is disputed. There was testimony tending to show that it was practicable to have guards along the conveyors when the covers were off, and also that it was not practicable. The appellee's account of the accident is that, being at his proper place by a machine at the north end of the foundry, he was called to the south end; that he hastened to cross the middle conveyor at the north end of it, where the plank cover should have been, but it had been removed; that the foundry was very dimly lighted; that in consequence of the removal of the cover without his knowledge, he stepped into the conveyor, and received the injury complained of. There was other testimony, also, that the plank cover had been removed and the light dim. On the part of the appellants there was testimony that the plank cover was in place; that the appellee stepped into the conveyor south of the cover, and as to the sufficiency of the light. No instruction to the jury was asked by the appellee, and all that the appellants asked were given." \* \* \* The Supreme Court (per SCHOLFIELD, Ch. J.) in discussing the rule as to assumption of risk said:

"The general rule is, as contended by counsel for appellant, that where an employment is attended with danger, a servant engaging in it assumes the hazards of the ordinary perils which are included in it. But this assumes that the servant either actually knew of the danger, or by the exercise of ordinary care would have known of it; and it does not therefore have application where the servant was ignorant of the danger, and had no reasonable opportunity to know of it. Nor can it, manifestly, have application where the servant enters upon a hazardous employment under the promise of

his employer that he shall be thereafter instructed in his duties, for in such case the servant relies for protection upon the instruction to be thereafter given him.

" The testimony given by appellee tended to prove that he was seriously injured by appellant's machinery; that appellee had no previous knowledge of the danger by which he was injured; that he was required by appellant, against his own wishes and without having knowledge of the dangers of the situation, to leave his other work and engage in the work wherein he was injured; that appellant promised appellee, before he engaged in this work, that his duties should be pointed out to him, which promise was not performed. This, if unquestioned, is sufficient to sustain a recovery; and we have seen it cannot be here inquired whether it is the same cause of action alleged in the declaration, or whether it was disproved by other evidence. U. S. Rolling Stock Co. v. Wilder, 116 Ill. 100, 111, 14 Am. Neg. Cas. 273, *ante*. It may be conceded that it is not denied but that appellee was familiar with the locality where he was injured; but familiarity with locality by no means necessarily implies knowledge of the danger in superintending machinery at that locality — and this appellee's testimony expressly negatives." \* \* \*

**EMPLOYEE INJURED BY MACHINERY WHILE SHOVELING CLAY.** — In **THE MONMOUTH MINING & MANUFACTURING COMPANY v. ERLING**, 148 Ill. 521 (1894), judgment of the Appellate Court for the Second District, affirming judgment for plaintiff for \$3,000 in the Circuit Court of Warren county, was affirmed. The facts of the case were as follows:

" This is an action by appellee [plaintiff below], against appellant, on account of personal injuries caused by a defect in machinery furnished by appellant for use in its factory where appellee was employed. The injury occurred while appellee was shoveling clay out of a pan about eight feet wide and fifteen inches deep, used for the purpose of mixing and tempering the clay. The mixing and tempering were chiefly done by heavy iron wheels moving rapidly inside the pan by means of steam power. These wheels were connected with a shaft, and so arranged that in revolving in the pan they worked from the center to the circumference and back again. The machinery in the pan was controlled by means of a lever about ten feet long. To the end of the lever at the pan was attached a clutch, and when this clutch was raised by pulling down the outer end of the lever, it was thereby disconnected from the machinery which propelled the wheels, and the wheels would stop. Whenever

the outer end of the lever was not held down, the clutch would fall down into place of its own weight, throwing the machinery into gear and the wheels would start. Near the outer end of the lever an iron bolt was run through from below, and to the eye of the bolt was attached an iron rod about two feet long, with a hook on its lower end. This rod was used to operate the lever, and when pulled down the hook at the lower end of the rod was fastened over a hook in a post by the side of the lever, holding the lever down and preventing the machinery from starting. The outer end of the lever, when pulled down to stop the machinery, was about five feet and nine inches above the floor where the men worked, and when up it was about seven feet and six inches above such floor. There were five of these pans in the same room and operated by the same gang of men. One of the gang, Costello, operated the levers, stopped and started the machinery, looked after the proper tempering of the clay, and was a sort of foreman. The rest of the gang shoveled clay into the pan, and when properly mixed and tempered shoveled it out again. The work of the men was done while the machinery was stopped, and if the machinery should start while the men were in the pans the most serious results to them were reasonably to be apprehended. The evidence showed that there was a thread on the end of the eye-bolt above the lever, and that the only method adopted for securing it was by nuts screwed down from above on top of the lever. Originally there were two such nuts — one above the other — but the upper nut had been gone from its place for at least two weeks, and probably much longer. The remaining nut had worked loose after the upper one had gone, and had been screwed down by Costello. The jar of the machinery tended to work the nut loose, and it was probably due to this cause that it worked off from the bolt and allowed it to come out of the lever. Appellant had a machinist, Carey, whose duty it was to look after the machinery and do the repairing. He was a witness for appellant, and testified that it was his duty to go around and see if anything was out of order, and if so, to repair it. To the same effect was the testimony of Apsey, the superintendent. Appellee denied that he had any notice of the defects of the machinery, or knew of the loss of the lock-nut. While appellee and another workman, Abrahamson, were in one of the mixing pans, in the line of their duty, shoveling out clay, the eye-bolt came out of the lever which controlled the wheels in that pan, allowing the lever to fly up and throw the machinery into gear, whereby the wheels were started and appellee was seriously injured." \* \* \* See also 45 Ill. App. 411.

*Machinist injured by buzz saw.*

WILLARD *v.* SWANSEN, 126 Ill. 381 (1888), was an action by Swansen, a machinist employed in Willard's shop, for injuries sustained by his hand and fingers being caught by a buzz saw. Judgment of Appellate Court for the First District, affirming judgment of Superior Court of Cook county, for plaintiff, was *affirmed*.

*Slipping on factory floor and injured by machinery.*

In Weber Wagon Company *v.* Kehl, 139 Ill. 644 (1892), employee slipping on smooth floor of wagon factory and striking against machinery whereby his hand was cut off, judgment for plaintiff for \$2,500 in the Circuit Court of Cook county, which was affirmed by the Appellate Court for the First District, was *affirmed*.

CARPENTER INJURED BY FALL OF SCAFFOLD — DEFECTIVE APPLIANCE — LIABILITY OF MASTER. — In GOLDIE ET AL. V. WERNER, 151 Ill. 551 (*June, 1894*), appeal from judgment of Appellate Court for the First District (50 Ill. App. 297), affirming judgment for plaintiff for \$7,500 in the Superior Court of Cook county, judgment for plaintiff was *affirmed*. The case is stated in the opinion by BAKER, J., as follows:

" This was an action on the case brought by Werner, appellee, against Goldie *et al.*, appellants, to recover damages for personal injuries. The result of the jury trial was a verdict in favor of the plaintiff below, awarding \$20,000 damages; but a *remittitur* of \$12,500 being entered by said plaintiff, the Superior Court of Cook county overruled the motion for a new trial, and rendered judgment in favor of said plaintiff, and against the defendants below, for \$7,500 damages. The judgment was affirmed in the Appellate Court, and a further appeal brought the case here.

" The declaration alleges, in substance, that plaintiff was in the employ of defendants as a carpenter in the erection of a certain building, and in performance of his duties as such carpenter, and by the direction of the foreman and servants of defendants, was required to go upon a certain scaffold made of wood, and it became the duty of defendants to furnish a strong and substantial scaffold which should not break or fall, but defendants negligently permitted the scaffold to remain in a bad and unsafe condition, in that the same was constructed so poorly and defectively that it became dangerous. It became necessary to carry a large piece of timber to a place designated by the foreman, and plaintiff, while assisting in carrying said timber over and upon said scaffold, with all due care, and without any knowledge as to the insufficiency of said

scaffolding, the scaffolding gave way, whereby plaintiff fell and was injured. At the time of the accident, Werner, the plaintiff, was forty-three years of age, and the injuries he received were of a horrible character, and have permanently disabled him from the performance of any physical labor; and from his present condition there will never be any improvement." \* \* \*

After stating the assignments of error the court said:

"The rule of law in respect to the burden of proof that it imposed upon a servant in a suit against his master, for injuries resulting from defective machinery, etc., is stated in Wood's Master and Servant, § 414: 'The servant, in order to recover for defects in the appliances of the business, is called upon to establish three propositions: 1. That the appliance was defective; 2. That the master had notice thereof, or knowledge, or ought to have had; 3. That the servant did not know of the defect, and had not equal means of knowing with the master.'

"In order to apply this law to the pending litigation, it is necessary to state certain facts that are conceded, and not in controversy. The accident occurred during the construction of the Masonic Temple, at the corner of Randolph and State streets, in the city of Chicago, and at the time of the accident but little work had been done other than digging the basement. The basement was some eighteen or twenty feet deep, below the level of the sidewalks. The defendants, building contractors, had the contract for putting a temporary board roof over the basement, for the masons to work under in the basement. That roof was not yet in place, and it was requisite, in order to construct the roof, that certain girders that were intended to support the roof should be put in place, and said girders were 9x12 inches, and about sixteen feet long, and quite heavy. The scaffold, out of which this litigation arises, was being erected on the morning of the accident, and for a temporary object, simply and solely for the purpose of carrying across it one of the wooden girders, and as soon as the wooden girder was across and in the place where it was wanted, the scaffold was intended to be torn down, and a scaffold be put up a little further along, where the next girder was to come, and so on, *seriatim*, until all the girders were in the places where they were wanted. The scaffold was built by nailing a plank across between two upright posts, about the height of the sidewalk or street, and then running joists from that plank and resting them on the sidewalk or a stone wall, which was about level with the street, and then putting loose planks on top of the joists. When the scaffold was finished, and at the time the accident occurred, the plaintiff and some six or nine other men

were carrying one of the girders across the scaffold to put it in place, when one of the joists supporting the planks of the scaffold turned over and broke, which caused the planks resting upon said joist to break, and plaintiff was precipitated from the scaffold to the basement beneath, falling upon some timber in the basement, and the girder falling upon him.

"The evidence for the plaintiff was that the joist that broke was defective, that it had a knot in it at the east end of the joist, about five inches long across the joist, and that it was broken, as one witness says, 'right in the knot,' or, as another expresses it, 'right near the knot,' and there is expert evidence that 'the knot made a very weak point' in the joist. Witnesses for plaintiff also testified that the joist was set up on an edge, and ran north and south; that the south end of the joist rested on the south wall, and the north end rested upon a brace; that it was not braced up in any way, but was just set upon edge; that it was not fastened or nailed to the post on the inside, not braced with anything, or nailed in any way. And an expert witness testified that if the joist had been fastened it would not have broken.

"To revert, now, to the three propositions that the servant must *prima facie* establish, or offer evidence tending to prove, in order to entitle him to go to the jury.

"We think there can be no question but that he proved, at least *prima facie*, and we are inclined to think conclusively, that the scaffold was defective, and not reasonably safe.

"The second proposition is, that he must introduce evidence tending to show that the master had notice of the defect, or knowledge, or ought to have had. Plaintiff did not comply with this requirement of the law, unless it be that he produced testimony tending to prove that one Joseph Schwartz was a foreman for defendants in the construction of the scaffold and roof, and plaintiff, an employee in such work, subject to his orders, and under his control and direction; and also introduced testimony tending to prove that said Schwartz had knowledge, or ought to have had, of the defect or defects in the scaffold." \* \* \*

After discussing the evidence on this point the court said: "We assume that the evidence tended, or fairly tended, to establish that Schwartz was a foreman and vice-principal of the defendants. But, even if he was the direct representative of defendants, yet, unless he had notice or knowledge of the defect or defects in the scaffold, or ought to have had such knowledge, the fact of his being such foreman would avail plaintiff nothing." \* \* \*

After further reviewing the evidence, the court said: "So, we are

forced to the conclusion that, so far as the requirement that the evidence must tend to prove that the master had notice of the defect, or knowledge of it, or ought to have had such knowledge, is concerned, the plaintiff was entitled to have his case go to the jury." \* \* \*

Continuing, the court said: "The question whether the negligence of the foreman in this case was, under the circumstances of the case, the negligence of a fellow-servant, or the negligence of a master of whom the foreman was the direct representative, was a question of fact for the jury." \* \* \*

"It is further required of a servant that, in order to make out a case against his master, he should prove that he did not know of the defect, and had not equal means of knowledge with the master."

\* \* \* Reviewing the testimony on this point the court said: "This testimony most assuredly tends to prove not only that plaintiff did not know of the defects, but that he had not means of knowing equal to those afforded to Schwartz, the direct representative of defendants." \* \* \* Judgment for plaintiff affirmed. (WALKER & EDDY, appeared for appellants; CASE, HOGAN & CASE, and SETH F. CREWS, for appellee.)

**EMPLOYEE OVERCOME BY NOXIOUS GAS FALLING AND FATALLY INJURED.—CITIZENS' GAS LIGHT & HEATING COMPANY v. O'BRIEN,** 118 Ill. 174 (1886), was an action on the case brought by Nora O'Brien, in the McLean Circuit Court, against the defendant company, to recover damages for alleged negligence causing the death of Patrick O'Brien, her late husband. There were two trials in the Circuit Court, the verdict and judgment in the first being for plaintiff for \$5,000, and in the second for \$3,500. The first was reversed for an erroneous ruling of the trial court, and the second was affirmed by the Appellate Court for the Third District, from which defendant appealed. 15 Bradw. (Ill. App.) 400. The evidence tended to show that before and at the time of O'Brien's death he was in the employ of defendant, as a laborer, and was subject to the orders and directions of George B. Burns, superintendent of defendant's gas works; that immediately before the accident causing his death, O'Brien was ordered by Burns to remove some boards from the upper part of the building, which were in danger of taking fire; that in obedience to this order, O'Brien ascended a ladder resting against and extending a short distance above the condenser, from the top of which he caught hold of some iron girders, and swung himself up to where the boards were; that he remained there but for a few moments when, seeming to be strangely affected, he started to return, and in

doing so, fell to the floor below, resulting in serious injuries, from which he died in a few hours. The declaration also charged that the fall of the deceased was caused by inhaling poisonous gases negligently permitted to escape by defendant. The defense was that it was a mere accidental fall. After reviewing the facts the Supreme Court *affirmed* the judgment.

*Falling object — Employee burned by heated sand.*

In CRIBBEN ET AL. v. CALLAGHAN, 156 Ill. 549 (1895), employee injured by the falling of the roof of a ladle oven attached to factory of defendants, whereby he was burned by a quantity of heated sand, judgment of the Appellate Court for the First District affirming judgment for plaintiff in the Circuit Court of Cook county, was *affirmed*. Affirming 57 Ill. App. 544.

*Falling into vat of hot grease.*

In HESS ET AL. v. ROSENTHAL, ADM'R, 160 Ill. 621 (1896), employee killed by falling into a vat containing hot grease in defendant's slaughter house, judgment of Appellate Court for First District, affirming judgment for plaintiff in the Circuit Court of Cook county for \$5,000, was *affirmed*. Affirming 55 Ill. App. 324.

*Employee injured by elevator — Contributory negligence.*

In BLOCK v. SWIFT & CO., 161 Ill. 107 (1896), employee caught between elevator and floor in defendant's building and his leg injured, judgment for defendant in the Circuit Court of Cook county, which was affirmed by the Appellate Court for the First District (58 Ill. App. 354), was *affirmed*. It appeared that plaintiff tried to get on the elevator when his duties did not require him so to do, and there was no evidence of negligence on the part of the elevator operator.

**THE PULLMAN PALACE CAR COMPANY v.  
LAACK.**

*Supreme Court, Illinois, October, 1892.*

[Reported in 143 Ill. 242.]

**EMPLOYEE INJURED BY BURNING OIL — ATTEMPT TO PREVENT EXPLOSION — FAILURE TO PROVIDE PROPER APPLIANCES — QUESTION FOR JURY.** — In an action to recover damages for injuries sustained by plaintiff, an employee in defendant's brick kilns, caused by burning oil spreading from the feed pipe of an oil tank and flowing over plaintiff, saturating his clothing and catching fire, the accident arising from the attempt of plaintiff to disconnect the tank from the supply pipe and get it away from the oil which was on fire in order to prevent an explosion, the negligence charged being failure of defendant to provide safe appliances, etc., it was held that the case was properly for the jury, and although the case was extremely close upon its facts, judgment for plaintiff was affirmed.

**NEGLIGENCE — QUESTION OF FACT.** — The questions of negligence of the master and contributory negligence of the servant, are questions of fact to be determined from the evidence.

**FELLOW-SERVANTS — QUESTION FOR JURY.** — Who are fellow-servants is a question of fact for the jury.

**CHANGE OF APPLIANCE — NOTICE.** — Notice of a change of appliance to defendant's foreman, or to others who might be regarded as fellow-servants of plaintiff, was not notice to plaintiff.

**EXTRA-HAZARDS — DUTY OF MASTER TO WARN SERVANTS — DUTY CANNOT BE DELEGATED.** — If, by reason of the omission of defendant to supply the usual and ordinary means to prevent accident, the hazard to its servants was increased, and the change in appliances was not known to the servants, or so open and visible that they, by the exercise of ordinary care, would see and know of it, the legal duty rested upon the master to notify them of the increased danger to which they were thereby exposed and it being a duty owed by the master to the servant, it could not delegate that duty to another, even though a fellow-servant of the plaintiff, and absolve itself from liability resulting in consequence of the failure to communicate knowledge to plaintiff of the increased hazard.

**MASTER AND SERVANT — DUTIES AND LIABILITIES — ASSUMPTION OF RISK.** — The law of master and servant, and the duties of each arising out of the relationship, fully discussed in the opinion, with citation of numerous authorities.

**AGENT OF MASTER — LIABILITY OF MASTER.** — In the discharge of the duty resting upon and owing by the master to the servant, the acts of the person authorized by the master to perform the duty are the acts of the master. The liability of the master does not depend upon who performs the duty but upon the existence of the duty itself, which the master must perform, and he cannot, by delegating it to another, absolve himself from liability for its nonperformance.

**ATTEMPT TO SAVE PROPERTY — CONTRIBUTORY NEGLIGENCE.** — Where a servant is injured while attempting to save his master's property

from destruction, and in such attempt performs his duty as reasonable and prudent men would do, under the circumstances, he will not be held guilty of negligence because some unforeseen cause intervened which, concurring with the master's negligence, produced the injury, which reasonable and prudent foresight could not have anticipated.

**PROXIMATE CAUSE.** — The rules governing the question of proximate cause, fully treated in the opinion, with numerous authorities on the same.

**SAME.** — If the negligence of a defendant puts in motion the destructive agency, and the result is directly attributable thereto, and there is no intervention of a new force or power of itself sufficient to stand as the cause of the mischief, the negligence of the defendant must be considered as the proximate cause of the injury, if it could be foreseen, by the exercise of ordinary care, that injury might or could result from the negligence.

**SAME.** — An intervening sufficient cause is a new and independent force, which breaks the causal connection between the original wrong and the injury, and it becomes the direct and immediate — that is, the proximate — cause of the injury. The test is, was it a new and independent force, acting in and of itself in causing the injury, and superseding the original wrong, so as to make it remote in the chain of causation.

**NEGLIGENCE OF MASTER AND FELLOW-SERVANT — LIABILITY.** — Although the servant impliedly agrees that the master shall not be liable for the negligence of fellow-servants, he does not agree to take any risk or waive any liability of the master for his own negligence, and the servant may recover although the injury is the combined effect of the negligence of the master and fellow-servant. Where the negligence of two is, in combination, the proximate cause of an injury, either or both may be held responsible for the consequences resulting from their combined negligence.

**SAME.** — Where the negligence of the master is combined with the negligence of a fellow-servant in producing the injurious result, and neither is the efficient cause alone, the master as well as the fellow-servant is liable.

**APPEAL** from the Appellate Court for the First District (44 Ill. App. 34); heard in that court on appeal from the Circuit Court of Cook county. *Judgment for plaintiff for \$4,000 affirmed.*

" This was an action on the case, by appellee, against appellant, to recover for a personal injury alleged to have been received through the negligence of appellant. For several years before the accident appellant had been engaged in burning brick, and appellee worked as its servant in that business. In 1887 appellant commenced burning brick with crude oil for fuel, and appellee, before his injury, had assisted in burning several kilns of brick by the new method. In May, 1888, shortly after the kiln was fired, the injury occurred. The kiln then being burned was seventy or eighty feet long and about thirty feet wide. There were eighteen or twenty arches running through from side to side. Around the kiln, a little way from it near the ground, two pipes were laid side by side, each about two inches in diameter.

One of these pipes carried steam and the other oil for fuel. Opposite the end of each arch two short pipes, three-quarters of an inch in diameter, extended toward the arch, one connected with the oil pipe and the other with the steam pipe. The short steam pipe was about two feet and a half long, the small oil pipe perhaps a foot long. On the end of the steam pipe, at each arch, was placed what was known as the "burner." In the small oil pipes there was a check valve or stop-cock, near the main oil pipe, and the connection was made between this pipe and the burner by a rubber tube connecting the short pipe with the burner. The purpose for which the rubber was used was to permit expansion and contraction of the small steam pipe — in other words, so as to make the pipe containing the oil flexible. The burner was by this means extended, not into, but as near, the arch as possible, and the oil injected into the arch by the action of the steam through the burner. On the side track, twenty feet or more away from the kiln, common railroad oil tanks were run on their trucks, and the oil carried therefrom by means of a two-inch pipe, and emptied into the oil pipe surrounding the kiln. Prior to the time of the accident but one tank had been used at a time, and the supply pipe from the tank was fitted with a check valve near its entrance into the feed pipe or the pipe encircling the kiln. Each of the small pipes extending from the steam and feed pipes was supplied with a stop-cock near the feed pipe, so that both steam and oil could be shut off from any individual burner. There was also a check valve on the tank, by closing which the flow of oil from the tank could be shut off. This valve was so arranged that it could not be turned by hand, but necessarily required the use of a wrench or tongs.

"In the afternoon before the accident, the kiln being in condition to fire, Williams, the kiln foreman, was ordered by appellant, through its superintendent, to cut the feed pipe in the middle of the kiln on each side, and stop the ends, which was done. Prior to this there had been in use what was known as the 'Brown burner.' They were directed to attach the Brown burner to one-half of the feed pipe, or the pipe encircling one-half of the kiln, which appellee and the gang of men with him, under the direction of the steam-fitter of the appellant, did. By the cutting of the oil pipe the circulation of oil around the kiln was impossible, and to supply the other end, another tank was run upon the side-track, and attached, by a new supply pipe, with

the other half of the feed pipe, so as to furnish oil to run the other burners to be thereto attached. The purpose was to test the relative merits of the Brown burner and another, called the 'Cannon burner,' to see which would consume the greater amount of oil in producing the requisite continued heat. The attachment between the additional tank and the pipe surrounding the half of the kiln at which the Cannon burners were to be tested, including putting on the burners, was made by 'Mr. Cannon and his men,' possibly assisted by Mr. Williams, kiln foreman, and perhaps other fellow-workmen about the kiln. Cannon had been a gas-fitter, and was familiar with the work, but neither he nor the men under him were in the employ of appellant. In making connection between the tank and the feed pipe encircling the half of the kiln at which the Cannon burners were put, no stop-cock or valve was put in where the supply pipe from the tank joined the feed pipe, so that the oil running to the Cannon burners could be shut off only at two points — at the tank, and at the small stop-cocks where the small burner pipes joined the feed pipe. At the other end the supply pipe formerly in use was put in, which was supplied with the check valve near the feed pipe. This arrangement of the pipe to which the Cannon burners were attached was made by Cannon, and, as before said, possibly with the knowledge of the foreman, but appellee, nor the gang of men with whom he worked, had notice that the stop-cock at the joining of the supply and feed pipes had been omitted. The rubber pipe leading to the burner, from the heat and action of the oil, was soon destroyed, and would break or crack off, permitting the oil to escape, and the oil being highly inflammable, would catch fire from the heat of the arch and prevent the closing of the small check valve in the pipe leading to the burner, and in such case the stop-cock at the junction of the supply and feed pipes had always been used, and by shutting off the oil there a conflagration was prevented. This condition of things was known to appellant, and it had supplied rubber tubing in considerable quantities to take the place of such as might be destroyed in that way. It is shown that the breaking of the rubber and escape of the oil was frequent, the rubber lasting sometimes during the burning of a kiln and sometimes not.

"The kiln was fired in the evening. Appellee, and the gang of men under him, were in charge of the end of the kiln to which the old or Brown burners were fixed, and Williams and another

shift of men in charge of the other end until about twelve o'clock, midnight, when Williams and his gang retired and appellee and two helpers took charge of the entire kiln. About four o'clock in the morning appellee was on a ladder at the side of the kiln, observing the top, when a rubber hose connecting with one of the Cannon burners burst, and the oil immediately took fire, and, extending, so covered the small stop-cock that it was impossible to close it. He ran immediately to the place where the supply pipes joined the feed pipe, expecting to find the stop-cock where it had always previously been found, but found none. He called to the other employees, and went himself about two hundred feet and turned in the fire alarm, and immediately returned to the end of the kiln where the fire was spreading. The fire was spreading rapidly, was very hot, and fearing an explosion of the oil in the tank, appellee determined to disconnect the tank from the supply pipe and get it away from the fire. For this purpose he directed one of the men to shut off the tank — that is, to close the valve between the tank and the supply pipe. One of the men went on to the tank for that purpose, and again got off. Appellee inquired if the valve had been closed, and one of the men replied that it had. He again inquired, and upon being assured that it had been closed, he went under the tank and disconnected the feed pipe from the tank, when the oil from the tank flowed over him and saturated his clothing, which instantly caught fire from the burning oil spreading from the feed pipe. Appellee was seriously injured. It appears that the man who went upon the tank to close the valve endeavored to do so with his hands. Finding that impossible, he ran to get a wrench, but upon his return the flames were sweeping over the tank and drove him away.

"The negligence charged in the declaration, in the first count, was the neglect of appellant to furnish proper and safe connections between the tank and the brick kiln, and that the appellant negligently and improperly provided and used a connection made of rubber, which was unsuitable and improper for such purposes; that the rubber became heated and cracked and broke, permitting the oil to escape, which took fire, etc. The second count alleged the use of crude oil was dangerous and hazardous; that plaintiff was in appellant's employ as assistant to the foreman, and his employment necessarily brought him near to the tanks, kilns, etc., and it became and was the duty of appellant to exercise a

high degree of care and diligence in providing proper and safe appliances around the brick kiln and oil tank, and proper connections, etc., and also to provide a safety check, or some suitable device, to stop the flow of oil in case of accident, etc., so as to insure the safety of its employees; yet appellant did not do so, but carelessly, negligently and improperly provided a connection made of rubber, which, on becoming heated, vulcanized and broke, and the oil thereby escaped, and not having provided suitable and proper appliances by which the flow of oil could be checked, the flames from the kiln communicated with the oil, resulting, etc.

"After the plaintiff rested his case the defendant moved the court to direct the verdict for it, which the court denied. At the close of the case defendant asked the court to instruct the jury that the evidence did not sustain the plaintiff's cause of action, and to return a verdict for the defendant, which was also refused. The jury found for appellee, and assessed his damage at \$4,000. The judgment thereon was affirmed by the Appellate Court, and the case is brought here by the further appeal of the defendant below."

J. S. RUNNELLS and WILLIAM BURRY, for appellant.

EDMUND FURTHMANN, for appellee.

**Shope, J.**—At the close of appellee's case in chief, appellant moved the court to instruct the jury to return a verdict for the defendant, and this being denied, again, at the close of the case, asked and the court refused an instruction directing the jury to find for the defendant. This ruling of the court is assigned as error, and forms the chief ground of complaint in this court.

If there is in the record evidence upon which a verdict for plaintiff may be sustained, the court committed no error in not taking the case from the jury. It is only where the evidence, with all fair and legitimate inferences therefrom, is so insufficient to sustain a verdict for the plaintiff that the court must set it aside if rendered, that the court will be justified in directing a verdict for the defendant. *Simmons v. Chicago, etc., R. Co.*, 110 Ill. 346; *Chicago, R. I. & P. R'y Co. v. Lewis*, 109 Ill. 120; *Goodrich v. Lincoln*, 93 Ill. 360; *Phillips v. Dickerson*, 85 Ill. 11; *Lake Shore & M. S. R. Co. v. Johnsen*, 135 Ill. 641, 11 Am. Neg. Cas. 392; *Purdy v. Hall*, 134 Ill. 298. It is immaterial upon which side the evidence is introduced; if there is evidence which fairly tends to support the plaintiff's case it must be

submitted to the jury. If, therefore, there was any evidence tending to sustain the issues in plaintiff's behalf, the error is not well assigned in this court. The weight and degree of credit to be given to evidence fall within the province of the jury, and when their finding of fact has been approved by the trial court and its judgment affirmed in the Appellate Court, the only question raised in this court by an instruction seeking to take the case from the jury is, was there any evidence fairly tending to establish a right of recovery by the plaintiff. If there was, the finding of the trial and appellate courts is conclusive as to its sufficiency to support the verdict.

It is, however, urged, that the omission to put in a stop-cock in the supply pipe was not negligence, even if appellant can be held responsible therefor, and no other act of negligence being averred or proved, the plaintiff wholly failed to prove a case entitling him to recover. It is clear that the fact that the rubber used to carry the oil from the feed pipe to the burner was liable at any time to open and permit oil to escape, and that oil thus escaping was liable to ignite from the arch, was known, not only to the persons engaged in burning the kiln, but to the superintendent and officers of appellant. It had frequently happened, and it was known that the action of the oil and heat upon the rubber was such that it was very soon destroyed, and would crack open or break off. The company kept on hand a large supply of rubber to meet this condition. The manner of connecting the burner with the feed pipe was, the feed pipe opposite the arches was fitted with a short three-quarter inch pipe extending toward the arch, in which was fitted a stop-cock. Over the end of this short pipe the rubber tubing was forced, and the other end in like manner attached to the burner. The rubber tubing was about eighteen inches in length, and when completed it was about thirty inches from the feed pipe to the end of the burner next to the kiln. The effect of the breaking of the rubber might be the discharge of a stream of oil to its full capacity, practically under the stop-cock, as the evidence tended to show was done by the breaking in this case. The effect testified to would be likely to occur, the oil being highly inflammable, and, igniting, would prevent the use of the small stop-cock to check the flow of oil. The evidence tends to show that, without negligence on the part of appellee or his fellow-servants, it became, for the reason stated, immediately impossible to stop-

the flow of oil at that place; that he immediately went to the supply pipe, where a stop-cock had always before been inserted, and found none, and that this was the first notice he, or, so far as shown, his fellow-workmen then assisting him at the kiln, had that no valve had been put in to the supply pipe.

But, it is said, two ways of stopping the flow of oil having been provided, it was not negligence not to supply the third. The question as to whether it was or was not negligence was a question of fact, which has been found adversely to appellant's contention. The jury was justified by the evidence in finding that the check-valve in the three-quarter inch pipe, as could readily have been foreseen might be the case, was rendered immediately useless by the spread of the burning oil. There was evidence tending to show that the valve on the tank was not relied upon in an emergency, as, when it became necessary to quickly stop the flow of oil. It was used when the supply pipe was to be attached or disconnected or the car moved. It is conceded that, from its construction, it could not be turned by hand. Counsel for appellant say, in speaking of it: "It was evidently so arranged that it required some kind of wrench to turn it." No notice was given appellee, or any of his fellow-workmen in the same gang or shift, of the omission of the stop-cock from the supply pipe, so as to enable him or them to have appliances ready to shut off the oil from the tank if it became necessary. When Wagner, and others of the fellow-workmen, were called to assist in moving the tank, he jumped upon it and endeavored to turn the valve with his hand, and found it impossible. He went immediately for a wrench, but upon his return was driven away by the flames. Notice to William, foreman at the kiln, or to others who might be regarded as fellow-servants of appellee, was not notice to appellee. If, by reason of the omission to supply the usual and ordinary means to prevent accident, the hazard to its servants was increased, and the change in appliances was not known to the servants, or so open and visible that they, by the exercise of ordinary care, would see and know of it, the legal duty rested upon the master to notify them of the increased danger to which they were thereby exposed; and it being a duty owed by the master to the servant, it could not delegate that duty to another, even though a fellow-servant of appellee, and absolve itself from liability for the injury resulting in consequence of the failure to communicate knowledge to appellee of the

increased hazard. Chicago, etc., R. Co. *v.* Ross, 112 U. S. 377; Indiana Car Co. *v.* Parker, 100 Ind. 181 (1); Thompson on Neg., 972; Wharton on Neg., § 211; 4 Am. & Eng. Ency. of Law, 59, note 3.

It is also insisted that a change in the appliances, by means of which it is alleged the injury was caused, although not known to appellee, having been made by his fellow-servants, the negligence, if any, was that of his fellow-servants, and he cannot therefore recover. This question, like the preceding, was one of fact. Whether the persons who put in the appliances to which the Cannon burners were attached were fellow-servants of appellee in performing that work, under the rules defining who are fellow-servants, was a question of fact. Indianapolis & St. L. R. Co. *v.* Morgenstern, 106 Ill. 216; Chicago & N. W. R. Co. *v.* Moranda, 108 Ill. 576. There is ample evidence from which the jury might have found that they were put in by Mr. Cannon, and men in his employ (none of whom were in the employ of the appellant), under a license from appellant, for the sole purpose of testing the relative merits of the two burners in the consumption of oil in producing the requisite heat to burn a kiln of brick. If so, they were not fellow-servants of a common master with appellee, or engaged in the same line of employment, or so associated with him as to fall within the definition of fellow-servants, as held by this court in the foregoing and numerous other cases. Where the negligent act is a direct result of the exercise of power conferred by the master, in the performance of a duty devolving by law upon him, the master is liable. Chicago & Alton R. Co. *v.* May, 108 Ill. 288; North Chicago Rolling Mill Co. *v.* Johnson, 114 Ill. 57, 14 Am. Neg. Cas. 270, *ante*. If, therefore, it be said that they were fellow-servants of appellee, or that fellow-servants of appellee in the work of burning brick and operating the appliances furnished by the master at the kiln assisted in putting in such appliances, they would not be fellow-servants of appellee in respect of the particular work done by them.

That the master, although not held to guarantee the absolute perfection and suitableness of the machinery and appliances furnished the servant, is, nevertheless, bound to provide that which is safe and suitable for carrying on the business in which

1. See the PARKER case, 100 Ind. 181, cases in this volume of AM. NEG. CAS., one of the leading Indiana cases, fully *post*, reported and annotated with the Indiana

the servant is engaged, and is held to the employment of every precaution which a reasonably prudent man would exercise under like circumstances, is well established. Arising by implication from the contract of employment, as well as from reasons of public policy and natural justice, the duty rests upon the master — whether a corporation or a natural person — not to expose the servant, in the discharge of his duty, to perils and dangers which the master may guard by the exercise of reasonable care. *Penn. Co. v. Lynch*, 90 Ill. 333; *Fairbank v. Haentzche*, 73 Ill. 236; *Missouri Furnace Co. v. Abend*, 107 Ill. 44, 14 Am. Neg. Cas. 250, *ante*. Hence the rule is, that the master must, either personally or by his agent, if an individual, and by its agents, if a corporation, exercise reasonable and proper care, taking into consideration the nature of the business and the instrumentalities employed, to provide and keep in suitable repair and condition safe and suitable machinery and appliances, adequately sufficient for use by the servant in and about the business in which they are to be used by him; and if a servant is injured in consequence of a neglect of such duty or a negligent discharge of it, he being in the exercise of ordinary care for his own safety, the master is liable. Cases *supra*; *Chicago & Alton R. Co. v. Platt*, 89 Ill. 141; *Col., Chic. & Ind. R. Co. v. Troesch*, 68 Ill. 545; *Calumet Iron & Steel Co. v. Martin*, 115 Ill. 358, 14 Am. Neg. Cas. 258, *ante*; *Wood on Master and Servant*, § 326 *et seq.*; *Beach on Contrib. Neg.*, 123; *Hough v. R. R. Co.*, 100 U. S. 213. It necessarily follows, that in the discharge of the duty resting upon and owing by the master to the servant, the acts of the person authorized by the master to perform the duty are the acts of the master. The liability of the master does not depend upon who performs the duty, but upon the existence of the duty itself, which the master must perform, and he cannot, by delegating it to another, absolve himself from liability for its non-performance.

As a general rule, the servant assumes the natural and ordinary risks of the business in which he engages, and is held to impliedly contract that the master shall not be liable for injuries consequent upon the negligence of a fellow-servant, in the employment of whom the master has exercised proper care, but he does not assume or contract to waive liability of the master for his own negligence, whether committed in person, or by an agent authorized by the master to perform a duty resting upon

him. In such case, the master being under contract duly to perform, the servant may, without sufficient appearing or being shown to put him upon notice to the contrary, rely upon the due and reasonable performance of the duty. The law will not permit the master to evade the duty which it has cast upon him, by shifting it upon another. In this case, the master licensed Cannon, who was in nowise connected with the work which appellee was employed to do, to put in his burners. This required a new supply pipe connecting another tank of oil with one-half of the feed pipe. It was put in for the convenience of the master or his licensee, and the master was bound to see to it that it was suitable and safe, or give notice to appellee, so that he might quit the employment if unwilling to assume the increased risk occasioned by the insufficient manner of its construction. The persons thus discharging the duty of the master were vice-principals, and their negligence was the negligence of the master.

But it is said, also, that upon the facts shown, appellee was guilty of such contributory negligence as to bar recovery. It is urged, first, that it was gross negligence for him to go under the tank and uncouple the supply pipe, whereby the oil poured over him; and second, that having been in a place of safety when he went to turn on the fire alarm, it was negligence for him to return to the place of known danger.

In respect to the first, it will only be necessary to say, that whether the doctrine of comparative negligence, as defined in *Galena, etc., R. Co. v. Jacobs*, 20 Ill. 478, 11 Am. Neg. Cas. 389(1), and subsequent cases, has still a place in the jurisprudence of this State, and whether the later case of *Calumet Iron & Steel Co. v. Martin*, 115 Ill. 358, 14 Am. Neg. Cas. 258, *ante*, and other cases since decided, have not placed that doctrine upon

1. *Comparative negligence.* — As was pointed out in a NOTE ON COMPARATIVE NEGLIGENCE, contributed to 2 AM. NEG. CAS. 646-647, the doctrine of comparative negligence has been abrogated in Illinois. The doctrine seems to have been first announced in *Galena & Chicago Union R. Co. v. Jacobs*, 20 Ill. 478, 11 Am. Neg. Cas. 389-390, and although in subsequent cases the same was qualified and modified, it was applied to numerous cases and was the settled doctrine of the State from 1858 to 1885.

In *Calumet Iron & Steel Co. v. Martin*, 115 Ill. 358, 14 Am. Neg. Cas. 258, *ante*, the court held that the doctrine of comparative negligence, as announced in the earlier cases, was no longer the law in Illinois, and was not to be regarded as a correct rule of law applicable to this class of cases (action to recover damages for death of person killed by explosion of boiler). For a full discussion of the doctrine and its abrogation see the note before referred to, in 2 AM. NEG. CAS. 646-647.

a basis where it has become simply another form of stating the common-law rule of contributory negligence, need not be here discussed, for the reason that it can have no application to cases like this, where the defendant is found to be in the exercise of ordinary care. The question was fairly submitted whether the plaintiff was, in uncoupling the supply pipe, in the exercise of ordinary care for his own safety, and the jury have found that he was, upon ample evidence to sustain the finding. This is conclusive of the question of the right of recovery, if his injury was the result of the defendant's negligence. *Calumet Iron & Steel Co. v. Martin*, 115 Ill. 358, 14 Am. Neg. Cas. 258, *ante*; *Chicago & Eastern Ill. R. Co. v. Connor*, 30 Ill. App. 307; *Abend v. Terre Haute & Ind. R. Co.*, 111 Ill. 203, 11 Am. Neg. Cas. 421; *Wharton on Neg.*, § 334, *et seq.*; *Shearm. & Redf. on Neg.*, §§ 25, 36, 37.

In respect to the second point, we are referred to numerous cases holding that, because of the sacredness with which human life is regarded by law, negligence will not be attributable to him who impulsively rushes into known danger to save it. But that rule does not apply to one who goes voluntarily into such danger to save property, whether his own or another's. The authorities are not uniform upon the last proposition, but its determination here is wholly unimportant. When appellee returned from sending the fire alarm there was nothing, save the possible explosion of the oil tank, that menaced him with personal danger. He undertook to move the tank out of the way of the fire, and undoubtedly would have succeeded, without injury to himself, had the valve upon the tank been closed when he uncoupled the supply pipe from it. It was his duty to make all exertion possible, consistent with his personal safety, to rescue the master's property and prevent the farther spread of the conflagration. He was required to judge of the danger from the condition of affairs as they then existed, and act with promptness and as prudence dictated, and if, at the time he returned and endeavored to perform his duty, reasonable and prudent men, under all existing circumstances, would have apprehended no personal danger, he is not to be held guilty of negligence in returning because some unforeseen cause intervened, which, concurring with the master's negligence, produced the injury, which reasonable and prudent foresight could not have anticipated. Whether there was in fact danger from explosion from the tank

is unimportant. It did not explode, and the injury did not result from that or from any danger to appellee's person, real or apparent, that the utmost prudence could have reasonably apprehended when he returned to the place of injury.

But it is urged that, the injury resulting as a consequence of the negligence of a fellow-servant in not closing the valve upon the tank, no recovery against appellant can be justified. It is said, first, that the negligence of the fellow-servant intervening as an efficient cause of the injury, the negligence of the master, if any is attributable, became the remote, and not the proximate, cause; and second, that the master not being liable for injury inflicted in consequence of the negligence of a fellow-servant, if the injury would not have resulted but for such intervening negligence of the servant the master is not liable.

The fallacy of the first position lies in its assumption of the fact that the negligence of the fellow-servant was, in and of itself, a new and efficient cause of the injury. Whether the negligence of the defendant was the proximate cause of the injury was a question of fact, also, to be determined by the jury, under proper instruction from the court. We held in *Fent v. Toledo, P. & W. R. Co.*, 59 Ill. 349 (approving *Toledo, P. & W. R. Co. v. Pindar*, 53 Ill. 451), that whether the alleged negligence was the proximate cause of the injury was in each case a question of fact, and expressly repudiating the contrary rule, as laid down in *Ryan v. N. Y. Cent. R. Co.*, 35 N. Y. 314, as in the teeth of almost numberless decisions and as unsupported by reason. In the subsequent case of *Toledo, Wabash & W. R'y Co. v. Muthersbaugh*, 71 Ill. 572, the same was again held. We said in the *Fent* case, *supra*, that so far as the case turned upon the issue of remote or proximate cause, the jury should be instructed that if the loss is a natural consequence of the alleged carelessness, which might have been foreseen by any reasonable person, the defendant is responsible, but is not to be held responsible for injuries which could not have been foreseen or expected as the result of the negligence. This is not to be understood as requiring that the particular result might have been foreseen, for if the consequences follow in unbroken sequence from the wrong to the injury, without an intervening efficient cause, it is sufficient if, at the time of the negligence, the wrongdoer might, by the exercise of ordinary care, have foreseen that some injury might result from his negligence. *Balt., etc., R. Co. v. Kean*, 61 Md.

154; Milw., etc., R. Co. *v.* Kellogg, 94 U. S. 469; Terre Haute, etc., R. Co. *v.* Buck, 96 Ind. 346, 3 Am. Neg. Cas. 148, and the cases collected; 4 Am. & Eng. Ency. of Law, 42; Consolidated Ice Machine Co. *et al. v.* Keifer, 134 Ill. 481; Miller *v.* St. Louis, etc., R. Co., 90 Mo. 389; Kellogg *v.* Chicago R. Co., 26 Wis. 223; Smith *v.* London, etc., R. R. Co., L. R., 6 C. P. 21 (1); Beven on Neg., 80, 81. Thus, in the Keifer case, *supra*, it could not be foreseen that the particular injury might follow the placing of the tank upon an insufficient support. It might have fallen and injured no one, or a person other than appellee's intestate. It was held sufficient that the support was so insufficient that injury might result from the falling of the tank.

If, therefore, the wrong of appellant put in motion the destructive agency, and the result is directly attributable thereto, and there was no intervention of a new force or power of itself sufficient to stand as the cause of the mischief, the negligence of appellant must be considered the proximate cause of the injury, if it could have been foreseen, by the exercise of ordinary care, that injury might or would result from the negligence "An intervening efficient cause is a new and independent force which breaks the causal connection between the original wrong and the injury, and itself becomes the direct and immediate, that is, the proximate, cause of an injury." Bishop on Non-Contract Law, §§ 42, 835, 836. And the test is, "was it a new and independent force, acting in and of itself in causing the injury, and superseding the original wrong complained of, so as to make it remote in the chain of causation." It must be manifest from this definition that the negligence of the fellow-servants, whether it be treated as creating a condition, merely, or as a cause, was not such an intervening efficient cause as to break the causal connection between the negligence of appellant and the injury. The

1. See *Smith v. London & S. W. R'y Co.*, L. R., 6 C. P. 14, a railroad fire case, plaintiff's property, which was two hundred yards from the place of breaking out, being destroyed. There was evidence as to one of defendant's engines having passed the spot shortly before the fire broke out but nothing to show emission of sparks from engine. It was held that it being common knowledge that engines do emit sparks, there was evidence for the jury that the fire originated in sparks from the engine that had passed the spot shortly before the fire occurred; and it was also held that if defendants were negligent they were responsible to plaintiff for the damage sustained by him, although they could not have reasonably anticipated such damage would result from their conduct. Judgment for plaintiff affirmed.

destructive agency set in motion by the negligence of appellant increased in extent by the flow of burning oil, igniting whatever was in its way that was combustible. This followed as a natural and inevitable sequence, and coming in contact with the oil upon appellant's clothing, ignition followed as a natural result. It therefore required the combined negligence of appellant and the fellow-servant to produce the conditions resulting in appellee's injury.

It is well settled that where the injury is the result of the negligence of the defendant and that of a third person; or of the defendant, and an inevitable accident; or an inanimate thing has contributed with the negligence of the defendant to cause the injury, the plaintiff may recover, if the negligence of the defendant was an efficient cause of the injury. (2 Thomp. on Neg., 1085, § 3; Bishop on Non-contract Law, §§ 39, 450, 452; Shearm. & Redf. on Neg., § 31, *et seq.*; *Carterville v. Cook*, 129 Ill. 152; *Consol. Ice Machine Co. v. Keifer*, 134 Ill. 481, and cases cited.) In such case, the negligence of two independent persons resulting in injury to the third, where neither is sufficient within itself, both are to be treated in combination as the proximate cause of the injury. It is clear that the negligence of the fellow-servant, in and of itself, could not have produced the injurious results suffered by appellee. The negligence of appellant and the fellow-servant were therefore concurrent causes, and combined were the proximate cause of the injury. An efficient cause is simply the "working cause," or that cause which produces effects or results (Webster), and a proximate cause is that which stands next in causation to the effect — not necessarily in time or space, but in causal relation.

The modification of instructions complained of was in harmony with the view here expressed, and was not erroneous. The court modified the twenty-first and other instructions asked by the defendant, and thereby said to the jury, in effect, that if they believed, from the evidence, that the injury resulted wholly from the negligence of the fellow-servant as the immediate cause of the injury, the defendant was not liable. This modification raises the second proposition, and in effect presents the question whether, where the negligence of the servant necessarily entered into or intervened to produce the injurious result, the master is liable. It would seem to follow, as a result of the doctrine, that although the servant impliedly agrees that the master shall not

be liable for the negligence of fellow-servants, he does not agree to take any risk or waive liability of the master for his own negligence — that the servant may recover although the injury is the combined effect of the negligence of the master and fellow-servant. It is a familiar principle, that where the negligence of two are, in combination, the proximate cause of an injury, either or both may be held responsible for the consequences resulting from their combined negligence. *Carterville v. Cook*, 129 Ill. 152; *Consol. Ice Machine Co. v. Keifer*, 134 Ill. 481; *Wabash, St. Louis & Pac. R'y Co. v. Shacklet*, 105 Ill. 364, 11 Am. Neg. Cas. 429n; *Union, etc., R. R. Co. v. Shacklet*, 119 Ill. 232 (1); 2 *Thomp. on Neg.*, 1085, § 3, and cases cited; *Cooley on Torts* (1st ed.), 684; *Hill on Remedies for Torts*, 178; *Wharton on Neg.*, § 788; *Shearm. & Redf. on Neg.*, § 122.

Mr. Bishop, after stating that the rule of law is, "that a person contributing to a tort, whether his fellow contributors are men, natural or other forces or thing, is responsible for the whole, the same as though he had done all without help," subject to the limitation that the person injured shall receive his damages but once (Non-contract Law, §§ 518, 519), proceeds (§ 684) that, within the doctrine thus explained, "a master whose negligence contributed to the injury of a servant is, if the servant's negligence did not contribute also, liable for the entire injury, though some other force for which the former is not responsible — for example, the negligence of a fellow-servant — likewise contributed," and cites in support, *Crutchfield v. R. R. Co.*, 76 N. C. 320; *Boyce v. Fitzpatrick*, 80 Ind. 526; *Paulmier v. Erie R. Co.*, 5 Vroom, 151; *Stringham v. Stuart*, 100 N. Y. 516; and *R. R. Co. v. McKinzie*, 81 Va. 71. See also *Thompson on Neg.*, 981, § 10; *Booth v. Boston, etc., R. Co.*, 73 N. Y. 38; *Cayzer v. Taylor*, 10 Gray, 274. These authorities fully sustain the position that where the negligence of the master is combined with the negligence of a fellow-servant in producing the injurious result, and neither is the efficient cause alone, the master as well as the fellow-servant is liable. No case to which we have been referred, or of which we are aware, has gone so far as to hold that where the negligence of the master contributes to the injury the servant may not recover. The doctrine of contributory

1. Except where otherwise stated the and servant, are reported in this vol Illinois cases cited in the case at bar, ume of AM. NEG. CAS., post.  
arising out of the relations of master

negligence is confined to the negligence of the party injured, and it is such negligence only, concurring with the negligence complained of, that will defeat the right of action.

The modification of the defendant's instructions had the effect of making them conform to the rules and principles herein held, and was not, therefore, in our judgment, erroneous. Nor was it error for the court to refuse the instructions in effect taking the case from the jury.

While the case is extremely close upon its facts, the jury were correctly instructed, and we find no error for which the judgment should be reversed. It is accordingly affirmed.

Judgment affirmed.

**FALLING DOWN SHAFT OF COAL MINE — EMPLOYEE KILLED — STATUTE.** — In *CATLETT ET AL. v. YOUNG*, 143 Ill. 74 (1892), plaintiff's husband killed by falling down the shaft of defendant's coal mine, the top and entrance to which was alleged not to be properly fenced by gates to protect the same as provided for by Laws of 1879, pp. 207, 210, judgment for plaintiff in the Circuit Court of Vermillion county for \$2,000, affirmed by the Appellate Court for the Third District, was *affirmed*. (38 Ill. App. 198.) The court cited the following cases relating to actions brought under the Mining statutes:

"In *Bartlett Coal & Mining Co. v. Roach*, 68 Ill. 174, the suit was brought to recover damages for the death of one Roach, alleged to have been caused by the wilful failure of the company to comply with the provisions of section 8 of the Act of 1872, which required that the top of each shaft shall be securely fenced by vertical or flat gates, properly covering and protecting the area of the shaft. It was there said that the title of the act expresses the beneficent purpose that the legislature had in view in the passage of the law, viz., to provide "for the health and safety of persons employed in coal mines." It was there claimed, as here, that the deceased was guilty of such negligence as would prevent a recovery, and the court said: "There can be but little doubt, in view of the evidence, that the accident would not have occurred if the top of the shaft had previously been secured as required by the statute." And also said: "The very object to be attained by the law was to prevent injuries to persons so employed (*i. e.*, in coal mines), that the slightest degree of negligence might not prove fatal. It is shown conclusively, by the evidence, that if the gates had been in position the accident would not have happened, notwithstanding the manner in which he did his work."

"In the subsequent case of *Litchfield Coal Co. v. Taylor*, 81 Ill. 590, it was held that where a party is killed, on attempting to ascend from a coal mine, by the fall of a lump of coal, and it appears that the defendant wilfully used uncovered cages for the ascent and descent of persons working in the mine, in violation of the statute, which caused the death, a recovery may be had by his widow, notwithstanding the deceased may not have been free from fault and negligence on his part. Objection was there taken to the instruction of the court, that it excluded from the consideration of the jury the negligence of the deceased which may have contributed to the injury. It was held that the instruction was, in substance, correct, and it was said: "In the case under consideration it was the wilful conduct of the coal company of which the plaintiff complained, and while the deceased may not have been entirely free from fault, yet if the jury found, from the evidence, that the wilful conduct of appellant resulted in the injury, the verdict would be justified."

"The decision in the last cited case sustained the instruction given by the court, on the ground that under the statute of 1872 contributory negligence was not a defense. The present statute, so far as the question now under consideration is affected, is substantially the same as that of 1872." \* \* \*

#### Notes of cases arising out of accidents to employees in mines.

##### *Defective rope to coal mine cage — Fall of cage — Miner injured.*

In *PERRY v. RICKETTS*, 55 Ill. 234 (1870), judgment for plaintiff in the Circuit Court of Woodford county for \$587.33, was affirmed. The case is stated in the syllabus to the official report as follows: "In October, 1869, an employee in a coal mine, while descending the shaft in a cage, was precipitated to the bottom, the distance of 35 or 40 feet, by reason of the breaking of the rope by which the cage was being let down, and was seriously injured. In the spring, prior to the injury, the rope was old and in bad condition, and was then spliced; and was again spliced in August and September of the same year. The employer was then informed it was unsafe. The party injured had been employed at the mine only about twenty days when the accident occurred. One witness stated he told him he would be injured if he worked in the mine. The defect in the rope could not be detected by ordinary observation. Held, the use of the rope in its unsafe condition was gross negligence on the part of the employer and he should respond in damages to his employee for the injury resulting therefrom. It was not incumbent on the latter, under the circumstances, to notify the former of the defect, which he had but slight opportunity of knowing, and notice of which had already come to the employer."

##### *Employee killed in coal mine — Failure to provide gates to shaft — Statute.*

In *BARTLETT COAL & MINING CO. v. ROACH ET AL.*, 68 Ill. 174 (June Term, 1873), judgment for plaintiffs for \$800 in the Circuit Court of St. Clair county was affirmed. The action was for damages for death of Andrew J. Roach,

caused, as alleged, by the wilful failure of the company to comply with the provisions of section 8 of the Act of 1872, in regard to mines, which requires "the top of each shaft shall \* \* \* be securely fenced by vertical or flat gates, properly covering and protecting the area of the shaft." The court said: "There can be but little doubt, in view of the evidence, that the accident would not have occurred if the top of the shaft had previously been secured as required by the statute, and has since been done. \* \* \*

"It is insisted, the deceased was guilty of such negligence as would prevent a recovery. We perceive no want of ordinary care in his conduct. The only negligence proven is, in pushing the box in the wrong direction. It was quite common for the employees to do the same thing. It was done in this instance that he might load the car more evenly, and thus do the work of his employer better. At most, it was a mere indiscretion on his part. The very object to be attained by the law was, to prevent injuries to persons so employed, that the slightest degree of negligence might not prove fatal. It is shown conclusively, by the evidence, that if the gates had been in position the accident would not have happened, notwithstanding the manner in which he did his work. The injury was not occasioned by the negligence of a fellow-servant. It was caused by the failure of the company to comply with the provisions of the law." \* \* \*

*Miner struck by falling coal — Uncovered cage — Statute.*

In *LITCHFIELD COAL CO. v. TAYLOR*, 81 Ill. 590 (1876), miner fatally injured by a lump of coal which fell down the mine shaft while he was upon the cage for the purpose of being hoisted, the defendant company using uncovered cages in violation of the Miners' Act, R. S. 1874, p. 704, judgment for plaintiff, the widow of the deceased, for \$1,500, rendered in the Circuit Court of Montgomery county, was affirmed. The action was properly brought by the widow.

*Miner killed while trying to escape from fire — Statute.*

In *WESLEY CITY COAL COMPANY v. HEALER*, 84 Ill. 126 (1876), miner killed in trying to escape from a fire in the mine in which he was working, judgment for plaintiff in the Circuit Court of Peoria county, was affirmed, the defendant failing to provide proper means of escape under the Act of July 1, 1872.

*Miner struck by escaped coal cars — Statute.*

In *SANGAMON COAL MINING CO. v. WIGGERHAUS*, 122 Ill. 279 (1887), employee injured in coal mine being struck by certain coal cars which broke loose, and plaintiff being unable to escape from the track owing to alleged negligence of defendant to provide proper space free of obstructions as required by the Miners' Statute, R. S., chapter 93, section 8, judgment of Appellate Court for the Third District, affirming judgment for plaintiff in the Circuit Court of Sangamon county, was affirmed. See 25 Ill. App. 77.

*Employee injured while descending into mine — Incompetent engineer.*

In *NIANTIC COAL & MINING COMPANY v. LEONARD*, 126 Ill. 216 (1888), the defendant company was held liable for injury to employee, while descending into the mine, resulting from employment of incompetent engineer to take charge of engine used in lowering persons into and hoisting them out of the mine, and in improperly loading the descending car with a heavy piece of lumber. Judgment of Appellate Court for the Third District, affirming judgment

for plaintiff in the Circuit Court of Macon county, was *affirmed*. See 25 Ill. App. 95.

*Explosion in mine and employee killed.*

In *THE COAL RUN COMPANY v. JONES*, Adm'x, 127 Ill. 379 (1889), plaintiff's intestate while working on the timbering of a shaft in defendant's coal mine killed in an explosion caused by the flames of his lamp (which he tapped on the toe of his boot) coming in contact with the gas flowing upward from beneath the platform on which he was working, judgment for plaintiff was *reversed*. The second paragraph of the syllabus to the official report is as follows: "In an action by the administrator of a deceased miner, against a mining company, to recover for causing the death of the intestate through negligence, it is error to instruct the jury, for the plaintiff, that it was the duty of the defendant to cause the mine to be examined every morning with a safety lamp, by a competent person, to ascertain if fire-damp was present, and to cause to be provided suitable means of signaling between the top and bottom of the mine, where such failure of duty in no way contributed to the accident which caused the death. Such an instruction has no proper application to the facts." Other instructions were also held to be complicated, confused, argumentative, and therefore erroneous.

*Defective appliance — Hoisting cage — Employee killed.*

In *CONSOLIDATED COAL COMPANY OF ST. LOUIS v. MAEHL*, 130 Ill. 551 (1889), judgment of Appellate Court for the Third District, affirming judgment for plaintiff in the Circuit Court of Macoupin county for \$5,000, was *affirmed*. The action was brought to recover damages for the death of plaintiff's husband in defendant's mine, occasioned by alleged negligence of defendant and its failure to perform its legal duty in the operation of the mine. The death seems to have been caused by the negligent management of and defective appliance attached to the hoisting cage. See 31 Ill. App. 252.

*Fall of rock in mine — Employee injured.*

In *CONSOLIDATED COAL COMPANY v. WOMBACHER*, 134 Ill. 57 (1890), plaintiff, employed as a loader in defendant's mine, injured by fall of rock which fractured his spine and inflicted other injuries, judgment of Appellate Court for the Fourth District, affirming judgment for plaintiff in the Circuit Court of St. Clair county for \$2,500, was *affirmed*. See 31 Ill. App. 288.

*Fall of smoke stack in mine.*

In *CONSOLIDATED COAL COMPANY OF ST. LOUIS v. HAENNI*, 146 Ill. 614 (1893), blacksmith injured by fall of smoke stack which he was assisting in raising under orders from the "pit boss," the accident being caused by alleged defective and negligent arrangement of the appliances, judgment of Appellate Court for the Third District, affirming judgment for plaintiff in the Circuit Court of Macoupin county, was *affirmed*. See 48 Ill. App. 115.

*Minor employee caught in gearing of engine.*

In *GARTSIDE COAL COMPANY v. TURK*, 147 Ill. 120 (1893), minor employee ordered by superintendent to assist in the operation of loading coal into a "shaker," injured by being caught in the gearing of the engine, which he was directed to start, judgment of the Appellate Court for the Fourth District,

affirming judgment for plaintiff in the Circuit Court of Jackson county, was affirmed. See 40 Ill. App. 22, and 47 Ill. App. 332.

*Employee struck by coal cars in mine.*

In **CONSOLIDATED COAL COMPANY v. BRUCE**, 150 Ill. 449 (1894), miner engaged in loading coal cars in defendant's mine struck by car in dark passage in part of mine to which he had been sent and with which he was not familiar, judgment of the Appellate Court for the Fourth District, affirming judgment for plaintiff in the Circuit Court of Clinton county for \$1,500, was affirmed. See 47 Ill. App. 442.

*Collision between coal cars in mine.*

In **WENONA COAL CO. v. HOLMQUIST**, 152 Ill. 581 (1894), employee engaged in loading coal car standing on track alongside of a chute, injured by alleged negligence of other employees switching cars causing a car to collide against the car which plaintiff was loading, thereby injuring him, judgment of the Appellate Court for the First District, affirming judgment for plaintiff in the Superior Court of Cook county, was affirmed. The question of fellow-servants was discussed and numerous authorities cited. The doctrine of comparative negligence was declared obsolete and the true rule of recovery stated. See also 51 Ill. App. 507.

**MINOR EMPLOYEE KILLED BY FALL OF ROCK IN COAL MINE—RIGHT OF ACTION—PARTIES—STATUTE.** — In **THE QUINCY COAL COMPANY v. HOOD, ADM'R**, 77 Ill. 68 (*January Term, 1875*), judgment for \$1,142 for plaintiff in the Circuit Court of McDonough county was reversed.. The opinion rendered by McALLISTER, J., stated the case as follows: "John Allen Hood, being a minor, of the age of fourteen years, was killed by the falling of a rock from the roof of a common gang-way at the foot of the shaft of appellant's coal mine, and while in the employment of the latter in shoving cars in the mine. Appellee, his father, taking out letters of administration, brought this action under the Act of 1853, to recover damages upon the ground of negligence in the employer in not supplying a safe support for the roof of said gang-way. The declaration contains two counts, in each of which the age of deceased was stated, and the only allegation in respect to deceased leaving widow or next of kin, in either count, is, that he left plaintiff, his father, to whom the damages recovered can be distributed. There was a demurrer to the declaration, which was overruled, and plea of not guilty filed. On the trial it appeared that deceased left a mother, as well as a father, and five brothers and sisters, and, upon request of plaintiff's counsel, the court instructed the jury that, if they found defendant guilty, then they should assess the plaintiff damages at the amount of the pecuniary loss sustained, if any, by the next of kin to deceased, 'that is to say, his father, mother, brothers and sisters.' The jury, finding

the defendant guilty, assessed the damages at \$1,142. A motion for new trial and in arrest of judgment was made and overruled." \* \* \* The questions on appeal turned upon points of pleading under the statute and the judgment for plaintiff was reversed on the ground of the declaration not being properly framed under the statute. The court said: "All of the ingredients which must necessarily concur to give a cause of action, are, wrongful act, neglect or default of the defendant causing the death of the intestate under such circumstances as would entitle him to maintain an action if death had not ensued, and he must have left a widow or next of kin. These are indispensable prerequisites to a cause of action, and being shown, they entitle the plaintiff bringing the action as required, to nominal damages at least. But the fact of survivorship of a widow or next of kin being an essential element of the cause of action, renders it indispensable that it should be alleged in the declaration, and it was so decided in *C. & R. I. R. Co. v. Morris*, 26 Ill. 400." \* \* \* "In the case at bar, from the frame of the declaration, the defendant would be misled into the belief that the person specified was the only one upon whose interest in the life destroyed damages would be predicated." \* \* \* Judgment reversed. (C. F. WHEAT and D. G. TUNNICLIFF, appeared for appellant; Wm. H. NEECE, for appellee.)

## HINCKLEY v. HORAZDOWSKY.

*Supreme Court, Illinois, May, 1890.*

[Reported in 133 Ill. 359.]

### MINOR EMPLOYEE INJURED BY MACHINERY—INSTRUCTING SUCH EMPLOYEE—DUTY OF MASTER TOWARDS INFANT EMPLOYEES.

—The rule governing the employment of children, as laid down by text-writers and jurists, is: Where a child is employed, the employer must look out for the child and must see that it is not exposed to danger arising from machinery, etc., which an operative of ordinary intelligence and experience would perceive. Notice of danger is not enough. The child must be sufficiently instructed to enable him to avoid danger.

The foregoing rule applied in a case where a child, twelve years of age, was injured by his arm being caught in defendant's planing machine which he was directed to oil by defendant's foreman.

FELLOW-SERVANT RULE—MINOR EMPLOYEE.—The rule which prevents a recovery from the common master for an injury to a servant resulting from the negligence of a fellow-servant, held not to apply to the case of a child twelve years old.

APPEAL from the Appellate Court for the First District; heard in that court on appeal from the Superior Court of Cook county. (33 Ill. App. 259.) The facts appear in the opinion. *Judgment affirmed.*

MCKENZIE & WOOD, for appellant.

JONES & LUSK, for appellee.

**Wilkin, J.** — This is an action on the case, by appellee, against appellant, and other defendants not served, to recover for a personal injury alleged to have been received by him through their negligence.

The declaration is of one count only, and avers that defendants were, on July 4, 1886, the owners of, and operating, a planing mill in the city of Chicago, wherein they used and employed certain machines for planing wood, and said plaintiff, then a minor, of the age, to wit, twelve years, was then and there employed and engaged by said defendants in and about their said business, and while so employed and engaged, the plaintiff was then and there, by said defendants, negligently and improperly ordered and directed to attend to and oil one of the machines then and there used and operated, and being used and operated by said defendants, which said direction and order of said defendants was then and there dangerous and hazardous to this plaintiff, because of his tender age, as aforesaid, and well known so to be by said defendants, and while said plaintiff was engaged in attending to and oiling said machine, in obedience to said order and direction of said defendants, and using all due care and diligence, the arm of said plaintiff was caught, crushed and mangled in and by said machine, so that plaintiff is and will be a cripple for life because thereof, and deprived of the use of said arm. The plea was the general issue. Plaintiff below recovered a judgment for \$3,000 and costs, which the Appellate Court has affirmed.

It must be admitted, we think, that the declaration is rather an unusual one, and somewhat loosely drawn. It does not proceed upon the theory that the injury was received while plaintiff was performing labor outside of his contract of employment, although his counsel so treat it in their argument. The negligence complained of in the declaration is, that the defendants wrongfully ordered the plaintiff, he being a child, without experience in such matters, to oil a piece of machinery, the doing of which exposed him to great peril of life and limb. It is not the

case, merely, of a minor being set at dangerous work, for in such cases the master is not liable for the risk, if the servant has sufficient capacity to take care of himself, and knows and can properly appreciate the risk. 1 Shearm. & Redf. on Neg. (4th ed.), § 218. It belongs to the other class of cases mentioned by the authors in the same section, of which it is said: "But while the mere fact of minority is deemed immaterial, it is well settled, in America at least, that any actual incapacity of a minor to understand and appreciate the perils to which he is exposed is to be fully considered, and that he can recover from his master for injuries suffered from any peril the nature of which he did not know, or could not properly appreciate if he did nominally know, and to which a prudent and right-minded master would not have allowed him to be exposed." And, says Wharton, in his work on Negligence, § 216: "Hence, we may hold, that where a child is employed, the employer must look out for the child, and must see that it is not exposed to danger arising from the structure of building or machinery, which an operative of ordinary intelligence and experience would perceive. Notice of danger is not enough. The child must have sufficient instructions to enable him to avoid danger." Many cases are cited by both these authors in support of the text.

The rule is so just and humane, when applied to a case clearly falling within its principles, that no court would hesitate to enforce it as of first impression. Children of tender years are often employed about factories in which are used pieces of complicated and dangerous machinery. If one of these is sent by the master or his superintendent, with or without instructions, where he will be exposed to revolving wheels, belts and pulleys, any one may know that by reason of his inexperience and immature judgment, he is liable to be killed or maimed; and if he is injured while using due care for one of his capacity, it would seem too clear for argument that the master should be held liable. To say that such a child takes the risk of his employment — that if he is not willing to take the hazard of obeying the command he must refuse — is idle, if not cruel. By his inexperience he is unable to comprehend the risk; by his childish instincts he implicitly obeys. Of the existence of the rule, and its pre-eminent justice, there can be no doubt. Does this case fall within it? This question, with us, is not, does the evidence bring plaintiff clearly and satisfactorily within the rule — for

unless we can say there is no evidence tending to support a material element of the case, we must accept the judgment of affirmance in the Appellate Court as having settled the facts necessary to make out plaintiff's case, in his favor.

It is contended, however, that the evidence wholly fails to show that the foreman of defendants ordered the plaintiff to oil the machine by which he was hurt, and that the boy's own testimony proves the contrary. We do not so construe it. It certainly tends to prove that he was attempting to oil the machine because he had been told to do so by Joseph Knourek, the foreman. True, the foreman did not, at that moment, command him to do so; but he testified that he had general instructions from the foreman to attend to that duty when the machine needed oil, and his evidence at least tends to show that he was, at the time he received his injury, attempting to obey those instructions. It does not very clearly appear from the evidence how the injury was incurred. The knee, as we understand the evidence, was first caught by a revolving plate, and then the hand was drawn between the rollers; but just how the knee came in contact with the plate, or how the hand was brought between or within the rollers, does not appear. It is, however, shown by the boy's testimony, that in oiling the machinery while in motion he was exposed to a running belt and compelled to extend his arm over it. In other words, the effect of his evidence is that to oil that machine while running was attended with danger. It is doubtless true that the foreman, or other experienced person with mature judgment, could do so with comparative safety; but it is clear from the evidence, especially from the painful results, that it was hazardous for a child to attempt it. The fact that appellee had done that work for some time prior to the accident, and the number of times he had done so, were very proper facts to be considered by the jury in determining whether or not it was negligence in the foreman to require him to continue to do so, and also for the purpose of determining whether or not the injury resulted from inexperience and want of judgment, or from his own negligence; but such proof cannot be held to be conclusive against his right to recover. A child exposed to danger may escape for a time, but sooner or later an injury will in all probability occur.

The case of *Gartland v. Toledo, W. & W. R'y Co.*, 67 Ill. 498, strenuously insisted upon as governing this case, is not in

point. There the question was, whether a minor employee should be held bound by the rule which prevents a recovery from the common master for an injury resulting through the negligence of a fellow-servant. It was held that the mere fact that the plaintiff in that case was under twenty-one years of age, did not relieve him from the risk of negligence on the part of co-employees. Here it was a question of fact for the jury whether or not appellee was a child within the rule stated.

It appears from an amended bill of exceptions that on the trial the court stated to the jury: "It is admitted by and between counsel that these defendants were owning and controlling the planing mill when the injury occurred, *and that this foreman was their foreman.*" It is said this statement amounted to an oral instruction as to the law of the case, and was therefore erroneous. It is not denied that the statement as to the ownership of the planing mill was authorized by a stipulation of counsel, but it is insisted that the further statement that the foreman was defendants' foreman was a conclusion which, if properly drawn from the stipulation, could only have been properly given to the jury in writing. In the first place, the statement was not, in any sense, an instruction to the jury. Again, it was made in open court, and no objection was made to it, either as a statement of the agreement or as an oral instruction. And, finally, it was immaterial. It was not denied on the trial that the foreman who gave the order complained of to appellee was the foreman of appellant. His own testimony shows it.

It is also insisted that the court below improperly refused the following instruction: "If the jury believe, from the evidence, that the plaintiff was injured by following the direction or obeying the orders, or through the carelessness or by the fault, of his fellow-servant, Willie Knourek, then the plaintiff cannot recover." The reason why the common master is not held liable for an injury caused by the negligence of a fellow-servant is, because that it is one of the ordinary risks of the employment. But if the injured employee is a child, incapable of comprehending that risk, the rule ought not to apply. However, this instruction does not announce the rule correctly as applied to fellow-servants generally. It not only assumes that Willie Knourek was a fellow-servant of appellee, but that the master had used due care in the selection and employment of him. The instruction attempts to set up an affirmative defense, and to make it available it was not

only necessary to show that the injury was caused by the negligence of a fellow-servant, but also that the master had used ordinary care and prudence in employing such fellow-servant.

In the foregoing view of the law applicable to the facts of this case, the instructions given to the jury are not subject to the criticism made upon them, and in our opinion they are free from substantial error. We repeat, this is not the case merely of a *minor*, under twenty-one years of age, suing for an injury, but of a *child*, to whom the employer owed a special duty.

After a careful re-examination of this case, we have reached the conclusion that our former judgment of affirmance was right.

Judgment affirmed.

**MINOR EMPLOYEE INJURED BY MACHINERY — INSTRUCTIONS. — THE CHICAGO ANDERSON PRESSED BRICK COMPANY v. REINNEIGER (BY HIS NEXT FRIEND), 140 Ill. 334 (1892),** was an action by a minor servant, sixteen years of age, for injuries sustained while operating machinery in making brick, whereby his hand was caught by a part of the machine and so crushed as to necessitate an amputation of the arm below the elbow. There was a verdict and judgment for plaintiff in the Circuit Court of Cook county for \$3,000, which was affirmed by the Appellate Court for the First District, and on appeal to the Supreme Court the judgment was *affirmed*. (See 41 Ill. App. 324.) In discussing certain instructions the Supreme Court said:

"The plaintiff did not request the giving of any instructions, but the court gave an instruction of its own motion, a portion of which is claimed by the appellant to have been erroneous. By it the jury were told that, if a boy, employed in a factory where dangerous machinery is in use, 'is of sufficient age, intelligence and discretion to understand and appreciate the risk to which he is exposed, and if he is informed of the dangerous nature of the work in which he is engaged, then he must be held to have assumed the ordinary hazards and perils of such employment, and cannot recover for an injury which is the result of the ordinary peril and danger of his employment.'

"We think that the instruction correctly states the law. (*Hinckley v. Horazdowsky*, 133 Ill., 359, 14 Am. Neg. Cas. 312, *ante*; *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572; *Grizzle v. Frost*, 3 Fost & Finl. 622.) It is a general rule that, when a contract of employment is made with a minor, he assumes the ordinary hazards of such employment in the same manner as an adult assumes them. (*Gartland v. Toledo, etc., R. Co.*, 67 Ill. 498.)

But the rule is modified in case of young persons of inexperience and immature judgment, who are not capable of fully understanding and appreciating the perils to which they are exposed. They are entitled to recover for injuries which result from such perils, unless they have been instructed how to avoid them. Employers owe it as a duty to such inexperienced servants to point out the dangers of which they themselves have or ought to have the knowledge, and to give such warnings as may lead to the avoidance of injury by the exercise of reasonable care. More especially should this duty be performed where the danger and the means of avoiding it are not apparent, or fully within the comprehension of the servant. 1 Shear. & Redf. on Neg. (4th ed.), §§ 218, 219.

"Whether the plaintiff below was such a person as was entitled to demand of the defendant the performance of the duty here indicated, and whether the defendant actually discharged its duty towards him in this regard, were matters for the jury to determine from all the facts and circumstances of the case. The burden was upon the plaintiff to prove the existence and breach of such duty. (*Sullivan v. India Manfg. Co.*, 113 Mass. 399.) None of the instructions given hold that the burden of proof in this respect was not upon the plaintiff. Nor do we agree with counsel for the appellant, that there was no testimony in the case which justified the submission to the jury of the question, whether or not plaintiff was entitled to a modification in his favor of the general rule above stated." \* \* \*

MINOR EMPLOYEE CAUGHT BY GEARING OF MACHINERY — ASSUMPTION OF RISK — INSTRUCTION. — In **THE HERDMAN-HARRISON MILLING COMPANY v. SPEHR (BY NEXT FRIEND)**, 145 Ill. 329 (1893), where minor employee, a boy of seventeen years, was caught by the gearing of machinery in defendant's flouring mill while he was sweeping the machine with a broom, his hand being crushed, judgment for plaintiff in the Circuit Court of Christian county for \$2,250, which was affirmed by the Appellate Court for the Third District, was reversed for error in an instruction which ignored entirely the question as to whether plaintiff assumed the hazard of his employment, a question which was important for the jury to determine (See 46 Ill. App. 24.) On this point the Supreme Court said:

"That, as between employer and employee, the latter assumes all the usual dangers incident to the employment, and that he also takes upon himself the hazard of the use of defective tools and machinery, if, after his employment, he knows of the defect, but

voluntarily continues in the employment without objection, are familiar rules of law, often recognized by the decisions of this and other courts.

" That this general rule does not apply to employees who, from youth or want of the natural faculties, are unable to appreciate the danger incident to the employment, or which may result from the continued use of defective machinery or tools, is equally well settled. Such employees are entitled, at the hands of their employers, to instructions as to the danger, and how to avoid it. In other words, they are entitled to be put in possession of that knowledge which, to adults, comes from experience and mature judgment. 2 Thompson on Neg. 978; Deering on Neg., § 197; Wood on Master and Servant, § 350.

" Many of the cases sustaining this view are cited in the case of *Jones v. Florence Mining Co.*, 66 Wis. 268. In *Sullivan v. India Mfg. Co.*, 113 Mass. 396, it is held that the failure of the employer to give notice of the danger and instructions, will not necessarily make him liable, because if it is shown that the employee had obtained such knowledge from experience or other sources before the injury, that will be sufficient. And the cases all hold that when such knowledge is shown, then he stands on the same footing as other employees, and so we held the law to be, that a boy 'of sufficient age, intelligence, and discretion, to understand and appreciate the risk to which he is exposed, and if he is informed of the danger and nature of the work in which he is employed, then he must be held to have assumed the ordinary hazards and perils of such employment, and cannot recover for an injury which is the result of the ordinary peril and danger of his employment.' " *Chicago Anderson Pressed Brick Co. v. Reinneiger*, 140 Ill. 334, 14 Am. Neg. Cas. 317, *ante*.

**MINOR EMPLOYEE STUMBLING OVER OBSTRUCTIONS ON FLOOR AND FALLING ON COG-WHEELS OF MACHINERY.—*HARRIS v. SHEBEK (BY NEXT FRIEND, ETC.)*, 151 Ill. 287 (1894),** was an "appeal from a judgment recovered at law by appellee against appellant for \$2,000, in an action on the case for personal injuries resulting to the plaintiff through the negligence, as it is claimed, of the defendant, which judgment was thereafter affirmed by the Appellate Court. Defendant was owner of a factory in the city of Chicago, wherein he was manufacturing ornamental brass and iron goods. Plaintiff was employed therein to assist the nickel plater, brush off iron castings and carry them to the platers. The polishing and plating department was located on the third floor-

of the factory building, and consisted in chief of two rooms, a large one wherein were polishing and other machines, and a smaller one where was located the plating apparatus. In coming from the lower floor up into this department, the passage-way led up a flight of stairs on the west side of the large room, then along the rear or north end of said room across the same to the door connecting with the plating or smaller room, which door was in the north-east corner of the large room, and about two or three feet south of the north partition or rear end of the large room. About two feet south of this door, and close against the partition on the east side of the large room dividing it from the plating room, was situated what is known as a drawing machine. This was a machine operated by steam power, and used for making brass mouldings by drawing strips of sheet brass through a steel die. The machine was about two feet in width and eighteen in length, and consisted of a double set (four) of cog-wheels located at the north end of the machine, a long frame and an arrangement at the south end of the machine for holding the die. Of these sets of cog-wheels those nearest the door revolved upward, and the set farthest from the door downward, and each consisted of two wheels, one about sixteen inches and the other about eight inches in diameter, placed on a horizontal line about three and one-half feet from the floor. In operating this machine, the operator walked to the south end thereof, attached the clutch to a piece of brass and started the machine. Then he walked along until the chain attached to the clutch had drawn the brass through the die and had traveled north to the gearing described above. Then he reached over the cog-wheels, disengaged the clutch, took out the moulding, and walking back drew the chain to the south end of the machine ready to repeat the operation. Plaintiff claims that on the morning of February 20, 1891, when he had been in the employ of the defendant about two and one-half days, and at about 7:30 a. m., on said day, he was called by his foreman from the plating into the polishing room to do some work. That it was a dark, stormy morning, and as he was passing through the door between the rooms, being told to hurry up, he started forward, and stumbling over a pile of castings lying on the floor which the darkness prevented his seeing, a foot or so west of the drawing machine, fell upon the cog-wheels thereof, and thereby the four fingers upon his left hand were so badly injured as to necessitate amputation. The appellant assigns as error, variance between the proof and the allegations of the declaration, and in refusing instructions for defendant and in giving instructions for plaintiff." NEWELL & CAMP and A. B. WILSON, appeared for appellant; J. F. KOHOUT, for

appellee. The opinion was rendered by PHILLIPS, J., who, after reviewing the assignments of error, affirmed the judgment.

#### Notes of cases relating to injuries to minor employees.

##### *Defective appliance — Fall of iron hammer.*

In CHICAGO DROP FORGE & FOUNDRY COMPANY v. VAN DAME (BY NEXT FRIEND), 149 Ill. 337 (1894), boy, about fifteen years of age, injured by fall of iron hammer which was operated by steam, whereby his hand was severely injured, judgment of Appellate Court for the First District, affirming judgment for plaintiff in the Circuit Court of Cook county, was affirmed.

##### *Boy caught by shaft of machinery.*

In BRADLEY v. SATTLER, ADM'X, 156 Ill. 603 (1895), boy, twelve years old, caught by projecting pin and whirled around shaft of machinery, sustaining fatal injuries, judgment of Appellate court for the First District, affirming judgment for plaintiff in the Circuit Court of Cook county for \$5,000, was affirmed. Affirming 54 Ill. App. 504.

##### *Boy injured by machinery.*

In NORTON ET AL. v. VOLZKE (BY NEXT FRIEND), 158 Ill. 402 (1895), boy, eleven years old, injured by fingers being caught in machinery in defendant's factory, judgment of Appellate Court for the First District, affirming judgment for plaintiff in the Circuit Court of Cook county for \$1,700, was affirmed. Affirming 54 Ill. App. 545.

##### *Boy injured by machine saw — Contributory negligence.*

In SINCLAIR v. BERNDT, 87 Ill. 174 (1877), the syllabus to the official report states the case as follows: "Where a boy [thirteen years of age] employed to do work generally about a planing mill, such as a boy of his age and strength was capable of doing, while engaged in a business not dangerous, with proper care, left his post and went to the place of another lad, in front of a saw, and put a board to the machine, and while hurrying to get back to his own place, thoughtlessly put his hand on the saw, whereby he lost his fingers, it was held that no recovery could be had by the boy's father in a suit against the employer, for the injury, owing to the boy's negligence, and that the boy himself, if suing, could not recover." Judgment for plaintiff in the Circuit Court of Cook county for \$1,346, was reversed.

##### *Falling on slippery floor and injured by cogwheel of machine.*

In AMES & FROST COMPANY v. STRACHURSKI, 145 Ill. 192 (1893), minor employee, a boy of sixteen years, injured by his hand being caught in the gearing of defendant's "matcher" machine, caused by falling on slippery floor, whereby he was caught by the cogwheel, it was held that the evidence tended to show negligence on part of defendant in failing to properly guard and cover the gearing of the machine. Judgment for plaintiff for \$1,500 rendered on verdict in the Circuit Court of Cook county, affirmed by the Appellate Court for the First District, was affirmed by the Supreme Court.

##### *Clothing of female employee caught in machinery.*

In FAIRBANK ET AL. v. HAENTZCHE, 73 Ill. 236 (1874), action for damages for death of a young female employee who, while passing the machinery shaft in

defendant's factory, was drawn around the shaft by her clothing catching on it, and fatally injured, judgment for plaintiff in the Superior Court of Cook county was affirmed.

FALL OF FILE OF IRON ORE—EMPLOYEE INJURED WHILE LOADING CARS—LIABILITY OF CORPORATION FOR ACT OF AGENT—DUTY OF MASTER TO FURNISH SAFE PLACE TO WORK.—In **ILLINOIS STEEL COMPANY v. SCHYMANOWSKI**, 162 Ill. 447 (*October, 1896*), where plaintiff, an employee of defendant, was injured by the fall of a pile of iron ore which crushed his foot, he being engaged in loading the ore into vehicles, judgment of the Appellate Court for the First District (59 Ill. App. 32), affirming judgment for plaintiff in the Superior Court of Cook county, was affirmed. The facts of the case are stated in the opinion by the court (MAGRUDER, J.), as follows:

"Appellant [defendant below] was engaged in the reduction of iron ore and the manufacture of iron and steel at South Chicago, when the accident occurred which caused the injury to appellee [plaintiff below]. In the works of appellant at this time was a large pile of iron ore, several hundred feet long and about seventy-five high at the highest point. The ore on this pile was shot down with dynamite in the daytime by a gang of men. The ore, thus loosened and detached from the pile and lying on the floor at its bottom, was put into 'buggies,' or wheeled vehicles, and taken to the furnaces. Appellee was a servant in the employment of the appellant company, and, on the night of January 18, 1892, he was engaged in loading the ore into the 'buggies.' Upon the night in question it was snowing hard. About ten o'clock on that night, while appellee was thus at work at a mass of ore which lay upon the floor, a large piece of ore, about eight feet long and three feet thick, fell from the perpendicular part of the pile of ore, and crushed appellee's foot so as to permanently cripple him. The pile of ore, at the place where appellee was working, was perpendicular for a distance of from three to ten feet, and commenced to slope back at that distance from the floor. The ore was packed into such a solid mass that it required the use of explosives to loosen it. After it was shot down by dynamite, much of it was in large lumps, which had to be broken up by picks before they could be handled. Appellee was not a member of the gang, whose special business was to loosen the ore by dynamite in the day-time. He had nothing to do with that part of the work. His business was to put the ore, thus loosened from the pile and precipitated to the floor, into the 'buggies,' and, when they were too large, to break them with a pick. The men worked wherever the ore, shot down in the day-time, lay upon

the floor, and appellee, who had been engaged in this kind of work for about eighteen days before the accident, was generally at work at a distance of from seven to ten feet from the edge of the pile of ore.

"The evidence tends to establish the following circumstances: This night-work was usually done by the light of torches. On the night in question, which was dark and stormy, appellee seemed to regard the light as insufficient, and went to look for the boss, and, finding him about one hundred steps away, asked him for more light, or for 'another light.' The boss or foreman replied: 'You God damned son of a bitch, you go to work;' he then walked ahead of appellee to the place where the latter had been at work, and took up the pick and put it into the ore, striking the pile a number of times where it was straight or perpendicular, and, according to one of the witnesses, loosening it. He then threw down the pick and swore at appellee, and ordered him to work there. Appellee obeyed the order, and, in a very short time after the foreman left, the piece of ore already referred to, weighing several tons, fell from the perpendicular side of the pile and injured appellee as stated. There was some evidence tending to show that the bottom of the pile of ore was loose, and, if this was so, it would be apt to follow that the lower part of the pile would not support the upper part."

As to the duty to provide a safe place to work, and the liability of the company for the acts of its agent, the court said:

"Unquestionably, it was the duty of the appellant company, when, through its foreman, or superintendent, or boss, it ordered appellee to work near or alongside of the pile of ore, to see to it that the pile was safe. Appellee had nothing to do with the construction of the pile, or with the loosening of its material by means of explosives. He knew nothing about its condition. A foreman, in charge of workmen and clothed with the power of superintendence, is bound to take proper precautions for the safety of the men at work under him. Where he puts men at work alongside of such a pile of ore as has been herein described, which must be shattered by dynamite in order to loosen its component parts, it is his duty to observe carefully the condition of its material as to looseness or compactness, and all other features of its structure, so that he may be enabled to determine what should be done to prevent such injuries as those inflicted upon appellee. The jury might well have believed that, if he had exercised proper skill and foresight, the accident would not have happened. Whether or not appellee was in the exercise of ordinary care was a question of fact for the jury. It was no part of his duty to study the conditions affecting the

stability of the ore at the sides of the pile, or to do anything except to work as well as he could under the directions of the foreman or boss. *Hennessey v. City of Boston*, 161 Mass. 502.

"The fact that the foreman struck the pile a number of times with a pick may have had the effect of setting in motion the loose portions of the ore and causing the fall of the piece which produced the injury. Whether this was so or not was, at any rate, a fair matter of inference for the jury. The master is liable where the servant is injured by a temporary peril to which he is exposed by the positive negligent act of the employer without any negligence on the part of the servant. (*Fairbank v. Haentzche*, 73 Ill. 236, 14 Am. Neg. Cas. 321, *ante*. 'Where the personal negligence of the master has directly caused the injury, there the master's liability to the servant is the same as it would be to one not a servant.' (*Wharton on Law of Neg.*, § 205.)

"Where a corporation authorizes one of its employees to have the control over a particular class of workmen in any branch of its business, such employee is, *quoad hoc*, the direct representative of the company. The commands which he gives within the scope of his authority are commands of the company itself, and, if such commands are not unreasonable, those under his charge are bound to obey at the peril of losing their situations. Hence the company will be held responsible for the consequences. (*Chicago & Alton R. Co. v. May*, 108 Ill. 288; *Fanter v. Clark*, 15 Ill. App. 470.) Here, if the act of the foreman or boss, in picking at the pile, had the effect of weakening the support of the upper part of it, his conduct must be regarded as the conduct of appellant.

"The duty of the master to use reasonable diligence in seeing that the place where the work of his servant is to be performed is safe for that purpose, extends not only to such risks as are known to him, but to such as he ought to know in the exercise of due diligence. (*Cook v. St. P., M. & M. R'y Co.*, 34 Minn. 45; *Consolidated Coal Co. v. Haenni*, 146 Ill. 614, 14 Am. Neg. Cas. 310, *ante*.) In the case at bar, appellant was bound to keep the edge of the ore pile in such condition that it would not fall upon those whom the foreman ordered to work at its base.

"The rule that the master must furnish to his servant a reasonably safe place to work in, and must use proper diligence to keep such place in a reasonably safe condition, was recently applied by this court to a case where the plaintiff was injured while working for the defendant near a row of barrels, which were not kept in such condition that they would not fall upon plaintiff while working near the same. *Libby v. Scherman*, 146 Ill. 540." \* \* \*

**Fall of iron girder from building.**

In THE WIGHT FIRE PROOFING COMPANY *v.* POCZEKAI, 130 Ill. 139 (1889), judgment of Appellate Court for the First District, affirming judgment in the Superior Court of Cook county for plaintiff for \$2,000, was *affirmed*. Plaintiff was injured by the fall of an iron girder in a building in course of construction which had been placed there by the contractor in charge of the iron work of the building, with which the defendant had nothing to do. Plaintiff was employed in lowering scaffolding which had been used by masons in the employment of another contractor, and the accident happened while some of the defendant's employees were arranging the appliances for laying fire-proof arches on the roof of the building. Defendant was liable for the negligence of his servants. See also 30 Ill. App. 266.

**Fall of iron mold.**

In JOLIET STEEL COMPANY *v.* SHIELDS, 134 Ill. 209 (1890), track repainer in defendant's steel mill, while repairing track within the converting mill, injured by the slipping of an iron mold which fell on plaintiff's foot and leg, judgment of Appellate Court for the Second District, affirming judgment for plaintiff in the Circuit Court of Will county for \$3,000, was *reversed* for erroneous instruction which practically directed finding for plaintiff where the declaration and proof were defective. (See 32 Ill. App. 598.) The Shields case is distinguished in the case of Libby *v.* Scherman, 146 Ill. 540, where the corporation itself was charged with the negligent act, while in the Shields case the negligent acts were affirmatively alleged to have been done by defendant's servants, without showing that they were done by the class of servants whose acts would charge the principal with responsibility. [See Libby *v.* Scherman, reported in next paragraph.]

On a subsequent trial of the SHIELDS case, plaintiff recovered judgment for \$5,000, which was affirmed in the Appellate Court. (45 Ill. App. 453.) On appeal the Supreme Court *affirmed* the judgment. Rehearing denied. JOLIET STEEL CO. *v.* SHIELDS, 146 Ill. 603 (1893).

**Fall of barrels in packing house.**

In LIBBY, McNEILL & LIBBY *v.* SCHERMAN, 146 Ill. 540 (1893), judgment for plaintiff in the Circuit Court of Cook county for \$5,000, which was affirmed by the Appellate Court for the First District, was *affirmed*. (50 Ill. App. 123.) The declaration alleged that the plaintiff at the time he was injured was working for defendant near a row of barrels, piled to the height of twelve feet, in its

packing house, and that by reason of defendant's failure to maintain said barrels in such condition that they would not spread, tilt or fall, one of the barrels weakened and the pile of barrels fell upon plaintiff, breaking his leg, etc. The case was distinguished from *Joliet Steel Co. v. Shields*, 134 Ill. 109, where the negligent acts were affirmatively alleged to have been done by defendant's servants, without showing that they were done by the class of servants whose acts would charge the principal with responsibility, while here the corporation itself was charged with the negligent act. [See the *SHIELDS* case, reported in preceding paragraph.]

**Fall of roof of tank insufficiently supported.**

In *CONSOLIDATED ICE MACHINE COMPANY ET AL. v. KEIFER, ADM'R*, 134 Ill. 481 (1890), actions against two companies for negligence causing death of plaintiff's intestate, judgment of Appellate Court for the Fourth District affirming judgment for plaintiff in the Circuit Court of East St. Louis for \$2,500 was *affirmed*. (See 26 Ill. App. 466.) The fourth paragraph of the syllabus to the official report states the facts as follows:

"An ice machine company undertook to erect for a brewery company a refrigerator plant, which included a large iron tank. The latter company was to fix the location for the plant, and make and put in proper supports for the tank. When the supports were completed the agent of the machine company notified the president of the brewery company that they were not sufficient, but afterward, with this knowledge on the part of both companies, the agent of the machine company, with the approval of the brewery company, put the tank upon these insufficient supports, and commenced filling it with water, and sent one of its servants on the roof, who had no notice of the danger, and while he was on the roof the supports of the tank gave way, which caused the servant to fall with the roof, whereby he was killed. *Held*, that the companies were jointly liable in an action by the personal representative of the servant killed."

**Cave-in of bank of clay pit.**

In *CHICAGO ANDERSON PRESSED BRICK COMPANY v. SOBKOWIAK*, 148 Ill. 573 (1894), employee while working in defendant's clay pit injured by the falling in of the bank of the pit, judgment for plaintiff was *affirmed*. The trial in the Circuit Court of La Salle county resulted in a verdict for plaintiff for \$8,500. A remittitur of \$2,500 was entered, and judgment rendered for \$6,000. The Appellate Court for the Second District affirmed the judgment, which was subsequently affirmed by the Supreme Court. See also 34 Ill. App. 312; 38 Ill. App. 531; 45 Ill. App. 317.

**Accidents to employees while working on vessels.**

*Fall of block and tackle — Defective appliance.*

In SCHOONER "NORWAY" *v. JENSEN*, 52 Ill. 373 (1869), where a sailor on the schooner was injured by the falling of a block connected with the tackle caused by negligence of other employees in permitting the appliances to be in defective condition, whereby plaintiff's arm was broken, judgment for the plaintiff in the Superior Court of Chicago for \$1,000 was affirmed.

*Breaking of mast and schooner mate injured.*

In GUNDERSON *v. PETERSON*, 65 Ill. 193 (1872), where the mate of a schooner was injured by the breaking of a mast whereby he fell to the deck, it was held that the injury was one incident to the service, there being no appearance of rottenness or decay of the mast at the place of breaking, and judgment for plaintiff was reversed.

*Unloading barge — Falling into hole in flooring — Obvious defect.*

In EAST ST. LOUIS ICE & COLD STORAGE COMPANY *v. CROW*, 155 Ill. 74 (January, 1895), employee in defendant's service engaged in unloading rock from a barge, injured by falling into a hole in the flooring of said barge, judgment for plaintiff for \$2,000 in the City Court of East St. Louis, which was affirmed by the Appellate Court for the Fourth District (52 Ill. App. 373), was reversed, on the ground that the evidence did not show due care on part of plaintiff to avoid the injury, and that the defects in the barge being obvious to plaintiff, he was bound to prove the exercise of care on his part to avoid the injury.

*Caught in tow-line of barge — Incompetency of captain of tow.*

In WESTERN STONE COMPANY *v. WHALEN*, 151 Ill. 472 (June, 1894), it appeared that plaintiff, an employee of defendant, was in charge of a barge which was being towed by a steam propeller under the control of a captain employed by defendant, and while being so towed plaintiff was caught in the tow line and his leg crushed against a post, caused by alleged recklessness and negligence of the captain of the propeller in running too fast, etc. Judgment for plaintiff in the Superior Court of Cook county was affirmed by the Appellate Court for the First District which, on appeal to the Supreme Court, was affirmed. It was held that plaintiff and the captain of the propeller were fellow-servants, but the right of recovery depended upon the question of defendant's negligence in the employment of the captain, and defendant's knowledge of the incompetency of such captain, questions of fact which the jury found in plaintiff's favor, and which the Appellate and Supreme Courts affirmed. See 51 Ill. App. 512.

*Struck by coal while unloading barge — Defective appliance.*

In PENNSYLVANIA COAL CO. *v. KELLY*, 156 Ill. 9 (1895), employee unloading coal from the hold of a steamer, injured by the contents of a bucket which was overturned as it was being hoisted, whereby one of his legs was broken, judgment of the Appellate Court for the First District, affirming judgment for plaintiff in the Circuit Court of Cook county, was affirmed. Affirming 54 Ill. App. 622.

**EMPLOYEE FALLING INTO ELEVATOR HOLE IN FACTORY. — THE NATIONAL SYRUP COMPANY *v. CARLSON*, 155 Ill. 210, was an action for personal injuries received by plaintiff while**

walking through a passageway in a glucose factory, when he fell into an open elevator hole. The Appellate Court for the Second District reversed a judgment for the plaintiff for \$5,000. 42 Ill. App. 178. The case was again tried and judgment was rendered on verdict for \$3,000 for plaintiff which was affirmed by the Appellate Court. 47 Ill. App. 178. On appeal to the Supreme Court the judgment was *affirmed*. The question of a release was held to be one of fact, which was not reviewable by the Supreme Court.

See also the decisions in the Appellate Court, as follows: *NATIONAL SYRUP CO. v. CARLSON*, 42 Ill. App. 178; employee falling down elevator shaft in factory; judgment for plaintiff for \$5,000 *reversed* for erroneous instruction and exclusion of certain evidence. See also subsequent decision in 47 Ill. App. 178, where judgment for plaintiff for 3,000 was *affirmed*.

**NOTES OF PERSONAL INJURY CASES ARISING OUT OF THE RELATIONS OF MASTER AND SERVANT, DECIDED IN THE APPELLATE COURTS OF ILLINOIS.**

1. Dangerous premises.
2. Defective appliances.
3. Elevator accidents.
4. Explosions.
5. Electricity.
6. Falling objects.
7. Flying objects.
8. Loading and unloading cars, etc.
9. Machinery accidents.
10. Mines — Accidents in.
11. Minor employees.
12. Scaffolding accidents.
13. Miscellaneous.

[NOTE. — The vast number of Master and Servant cases relating to Injuries to Employees, reported in the Illinois Appellate Courts' reports, necessitates compression in this series of AM. NEG. CAS., and the Editor of that series deems it sufficient to merely give a brief note of the Appellate Courts' decisions, embracing them in a Special Classification of the topics treated in this volume. Wherever the Supreme Court has passed upon an Appellate Court decision the same will be found duly noted with the Illinois Supreme Court cases reported in this volume. Cases decided in the Illinois Appellate Courts from 1896 to date are reported in Vols. 1-14 AM. NEG. REP., and the current numbers of that series of Reports. Cases relating to Railroad Employees are Classified and placed at the end of the Illinois cases reported in this volume, 14 AM. NEG. CAS.]

**1. Dangerous premises.**

*Parlin & Orendorff Co. v. Finfrouck*, 65 Ill. App. 174; employee injured by inhaling a quantity of gas and fumes emitted by a blast furnace used for melting iron; judgment for plaintiff for \$2,500 *reversed*; assumption of risk, etc.

*Armour et al. v. McFadden*, 9 Bradw. (Ill. App.) 508; foreman in packing

house falling through hatchway; judgment for plaintiff *reversed*; failure to prove due care on plaintiff's part.

*Kolb, Adm'x, v. Sandwich Enterprise Co.*, 36 Ill. App. 419; employee falling through trap or hole in floor of factory; judgment for defendant *affirmed*; employee's knowledge of defective appliance.

*Chicago Packing & Provision Co. v. Roban*, 47 Ill. App. 640; steam fitter in packing house walking into vat of boiling water; judgment for plaintiff for \$12,800 *reversed*; failure to exercise due care.

*Illinois Steel Co. v. Mann*, 67 Ill. App. 66; employee injured by falling on dangerous floor in rolling mill where he was employed as heater; judgment for plaintiff *affirmed*.

## 2. Defective appliances.

*Harms v. Sullivan*, 1 Bradw. (Ill. App.) 251; stone-setter injured by negligence of fellow-servants and defective appliances; judgment for plaintiff for \$500 *reversed* for erroneous instruction as to negligence of parties.

*Chicago Dredging & Dock Co. v. McMahon*, 30 Ill. App. 358; employee while at work on a dredge struck by same, causing loss of arm; judgment for plaintiff *affirmed*.

*Tudor Iron Works v. Weber*, 31 Ill. App. 306; laborer in mill injured by coupling which was out of repair; judgment for plaintiff for \$2,000 *affirmed*.

*Sendzikowski v. McCormick Harvesting Machine Co.*, 58 Ill. App. 418; employee injured by defective appliance; judgment for defendant *reversed*; servant obeying improper orders of superior or using for brief time defective appliances under promise of immediate repair is not without remedy for injury sustained thereby.

*Ambrose v. Angus et al.*, 61 Ill. App. 304; employee injured by breaking of derrick boom while he was operating same; judgment for defendants *reversed* for erroneous instructions as to fellow-servants and assumption of risks.

*Ashley Wire Co. v. Mercier*, 61 Ill. App. 485; employee injured by falling of crane with which he was at work; judgment for plaintiff for \$7,000 *affirmed*.

See also *Ashley Wire Co. v. McFadden*, 66 Ill. App. 26, where employee was killed in same accident as in Mercier case; judgment for plaintiff for \$2,500 *affirmed*.

## 3. Elevator accidents.

*Fairbank Canning Co. v. Innes*, 24 Ill. App. 33; employee operating elevator killed by fall of elevator due to defective appliance; judgment for plaintiff for \$5,000 *affirmed*. See also 125 Ill. 410.

*Brunswick v. Strilka*, 30 Ill. App. 186; employee killed in elevator accident; judgment for plaintiff *reversed* for erroneous instructions.

*Aurora Cotton Mills v. Ogert*, 44 Ill. App. 634; female employee falling down elevator in cotton mill, both her arms being broken; judgment for plaintiff for \$1,000 *reversed*; contributory negligence.

## 4. Explosions.

*Holton v. Daly*, 4 Bradw. (Ill. App.) 25; machinist injured by bursting of emery wheel; judgment for plaintiff for \$5,000 *reversed* for erroneous instruction.

*Morris v. Gleason, Adm'x*, 4 Bradw. (Ill. App.) 510; engineer killed by explosion of steam boiler in flouring mill; judgment for plaintiff for \$5,000 *reversed* for erroneous instructions.

*Kranz v. White*, 8 Bradw. (Ill. App.) 583; female employee injured by explosion of generator in soda-water factory; judgment for plaintiff for \$2,000 reversed for erroneous instruction.

*Stearns v. Reidy*, 33 Ill. App. 246; employee in quarry blinded in explosion of dynamite; judgment for \$9,000 for plaintiff, who was rendered sightless, affirmed.

*Fitzgerald v. Honkemp*, 44 Ill. App. 365; employee injured by explosion of heated copper and slag which was drawn into water tank by a fellow-employee; judgment for defendant affirmed; fellow-servant rule applied.

*Hobbold v. Chicago Sugar Refining Co.*, 44 Ill. App. 418; foreman in refinery injured in explosion; judgment for defendant reversed for erroneous instructions.

*Dunham Towing & Wrecking Co. v. Christiansen et al.*, Adm'rs, 44 Ill. App. 523; member of wrecking crew killed by explosion of oil vapors on wrecked vessel; judgment for plaintiff reversed for error in excluding certain testimony desired on cross-examination.

*Alton Lime & Cement Co. v. Calvey*, 47 Ill. App. 343; employee injured in explosion of dynamite in quarry; judgment for plaintiff for \$150 affirmed.

### 5. Electricity.

*Chicago Edison Co. v. Hudson*, 66 Ill. App. 630; employee working near wires charged with electricity; statement by foreman that wires not dangerous; injured by contact with wire; judgment for plaintiff for \$800 affirmed.

### 6. Falling objects.

*North Chicago Rolling Mills Co. v. Monka*, 4 Bradw. (Ill App.) 664; laborer attending to blast furnace injured by weight from door falling on his foot; judgment for plaintiff for \$4,000 reversed for erroneous instructions.

*Heyer v. Salsbury*, Adm'x, 7 Bradw. (Ill. App.) 93; employee working in sugar factory fatally injured by fall of cover of the condenser caused by an appliance breaking; judgment for plaintiff reversed for erroneous instructions.

*Springfield Iron Co. v. Gould*, 11 Bradw. (Ill. App.) 439; mass of steel falling on plaintiff's foot; defective appliance; judgment for plaintiff reversed; assumption of risk; fellow-servant rule.

*Moline Plow Co. v. Anderson*, 19 Bradw. (Ill. App.) 417; employee injured by the fall of a grindstone on his leg caused by the breaking of a stick; judgment for plaintiff for \$2,000 reversed for erroneous instruction.

*East St. Louis Packing & Provision Co. v. McElroy*, 29 Ill. App. 504; employee in packing house struck by large piece of ice which ran off the slide while being conveyed to cooling room; judgment for plaintiff reversed; contributory negligence.

*Hellmuth v. Katschke*, 35 Ill. App. 21; employee injured by being struck by a barrel which fell from platform improperly placed by foreman; judgment for plaintiff for \$1,500 affirmed.

*National Gas Light & Fuel Co. v. Michke*, Adm'x, 35 Ill. App. 629; employee killed by fall of iron plate caused by explosion; judgment for plaintiff reversed for erroneous admission of certain evidence.

*Wells & French Co. v. Gortorski*, 50 Ill. App. 445; minor employee injured by fall of stringers in lumber mill; forced to work in dangerous position by foreman; judgment for plaintiff affirmed.

*Legnard v. Lage*, 57 Ill. App. 223; employee excavating clay from a bank struck by a piece of clay which fell and crushed his leg; judgment for plaintiff reversed; knowledge of danger; assumption of risk.

**7. Flying objects.**

*United States Rolling Stock Co. v. Chadwick*, 35 Ill. App. 474; employee's eye put out by a block thrown by a circular saw; judgment for plaintiff reversed, the evidence not justifying the verdict.

*William Graver Tank Works v. McGee*, 58 Ill. App. 250; employee, engaged as helper to blacksmith, struck in the eye by an iron chip which flew from a steel bar that was being cut with a cold chisel in defendant's works; judgment for plaintiff reversed for erroneous instructions.

**8. Loading and unloading cars, etc.**

*Whittaker v. Coombs*, 14 Bradw. (Ill. App.) 498; employee engaged in unloading cars and filling ice house injured in attempting to couple cars, his hand and fingers being caught between the cars; judgment for plaintiff reversed; contributory negligence.

*Keith v. Lynch*, 19 Bradw. (Ill. App.) 574; employee (Lynch) while unloading a cargo of coal from defendant's schooner struck on the leg by a heavy piece of timber thrown down hatchway; judgment for plaintiff for \$526 reversed for erroneous instructions.

*St. Louis Bolt & Iron Co. v. Brennan*, 20 Bradw. (Ill. App.) 555; employee injured by upset of car which he was assisting in loading; negligence charged to superintendent in directing the loading; judgment for plaintiff reversed; knowledge of danger; assumption of risk.

*Myers v. American Steel Barge Co.*, 64 Ill. App. 187; employee injured while loading corn on vessel at elevator; defective appliance; failure to show master's knowledge of defect; judgment for defendant affirmed.

*Tobin v. Friedman Mfg. Co.*, 67 Ill. App. 149; employee injured while loading ice into a refrigerator car; defective appliances; judgment for defendant affirmed; servant's misuse of appliance.

**9. Machinery accidents.**

*Anglo-American Packing & Provision Co. v. Baler*, 20 Bradw. (Ill. App.) 376; employee, feeder to machine called a sausage grinder, operated by steam, injured by hand and arm being caught by the knives of the machine; judgment for plaintiff reversed; erroneous admission of evidence as to habits of plaintiff as a worker.

*Anglo-American Packing & Provision Co. v. Lewandowski*, 26 Ill. App. 629; employee injured by chopping machine resulting in loss of two fingers; judgment for plaintiff for \$2,500 reversed, the fellow-servant rule being applied.

*George Lehman & Sons Company v. Siggeman*, 35 Ill. App. 161; employee's hand injured while cleaning a brick machine; judgment for plaintiff affirmed.

*Buhle v. Harland*, 37 Ill. App. 350; employee's hand caught in cog-wheels of machinery; judgment for defendant affirmed; knowledge of danger by employee.

*Williams, White & Co. v. Hensler*, 38 Ill. App. 584; employee painting machine injured by machine being set in motion; judgment for plaintiff reversed; obvious danger.

*Litchfield Car & Machine Co. v. Romine, Adm'r*, 39 Ill. App. 642; engineer fatally injured by a pipe attached to engine; judgment for plaintiff reversed; assumption of risk.

*Weigrefie v. Daw*, 40 Ill. App. 53; employee injured by circular saw; judgment for plaintiff reversed; cause of action not shown.

D. M. Sechler Carriage Co. v. O'Neil, 41 Ill. App. 633; employee's hand caught in cog-wheels of machine; contributory negligence; judgment for plaintiff reversed.

Wiggins Ferry Co. v. Heilig, 43 Ill. App. 238; employee injured while splicing a rope to pass around the winch in pile-driving work, as ordered by foreman, his arm being pulled between winch and rope by sleeve of coat catching; judgment for plaintiff reversed.

Illinois River Paper Co. v. Albert, 49 Ill. App. 363; employee injured by pulley of shaft; obvious dangers; judgment for plaintiff reversed.

Chicago Anderson Pressed Brick Co. v. Rembaz, 51 Ill. App. 543; employee in brick manufacturing company, shoveling clay into wheelbarrow to a crusher and another machine, injured by hand being caught and drawn into crusher machine and arm crushed; judgment for plaintiff for \$10,000 affirmed.

Pitrowsky, Adm'x, v. J. W. Reedy Elevator Mfg. Co., 54 Ill. App. 253; employee in foundry caught by revolving shaft and killed; judgment for defendant affirmed; if any negligence on defendant's part it was negligence of which deceased had knowledge, for which there could be no recovery.

Jones, by next friend, v. Roberts, 57 Ill. App. 56; female employee injured by laundry mangle which she was operating in defendant's laundry; judgment for defendant affirmed; knowledge of danger; assumption of risk.

Tesmer v. Boehm, 58 Ill. App. 609; employee injured while working on a machine called a "shaper" in defendant's furniture factory; defective appliance; judgment for plaintiff reversed; knowledge of danger.

Armour et al. v. Czischki, Adm'r, 59 Ill. App. 17; female employee killed by slipping into a glue crusher through unguarded opening in floor of glue factory where she was at work; judgment for plaintiff affirmed, on filing of remittitur from judgment for \$4,140, all in excess of \$1,500.

Charles Pope Glucose Co. v. Byrne, 60 Ill. App. 17; steam fitter injured by a part of his thumb being cut off by a piece of iron steam pipe carelessly allowed by a fellow-employee to get into wheels of certain machinery; judgment for plaintiff for \$314 affirmed.

Frazer & Chalmers v. Schroeder, 60 Ill. App. 519; employee, acting under orders of foreman, performing certain work with other employees in taking a casting from a wagon struck by one of the cranks in use for such work; judgment for plaintiff affirmed.

Taylor et al. v. Felsing, 63 Ill. App. 624; employee injured by machinery in flouring mill; judgment for plaintiff for \$2,600 affirmed; injuries, hand, wrist and arm crushed.

Swift & Co. v. Fue, 66 Ill. App. 651; employee's arm caught in cooling fan; judgment for plaintiff for \$3,500 affirmed.

#### 10. Mines — Accidents in.

Beaucoup Coal Co. v. Cooper, 12 Bradw. (Ill. App.) 373; mining agent killed by fall of cage caused by cable breaking; judgment for plaintiff for \$5,000 reversed; agent of defendant could not recover for injury caused by his own failure to comply with statutory provisions of the Mining Act as to safe appliances.

Beard et al. v. Skeldon, 13 Ill. App. 54: employee fatally injured by descending cage in mine, the cage falling owing to insufficient steam in the engine which operated it; judgment for plaintiff for \$4,000 reversed, for erroneous admission of certain evidence on the question of damages.

*Lincoln Coal Mining Co. v. McNally, Adm'r, 15 Bradw. (Ill. App.) 181;* employee working with another on a scaffold in an escapement shaft, putting up a water pipe, fatally injured by fall of a board which was being lowered by other employees; judgment for plaintiff *reversed*; fellow-servant rule; assumption of risk.

*Starne, Dresser & Co. v. Schlothane, 21 Ill. App. 97;* miner injured by descending cage; negligence of engineer; judgment for plaintiff for \$500 *reversed* for contributory negligence and under the fellow-servant rule.

*Kelley v. Wilson, 21 Ill. App. 141;* miner injured by fall of rock in coal mine; judgment for plaintiff for \$1,500 *affirmed*.

*Consolidated Coal Co. of St. Louis v. Young, Adm'r, 24 Ill. App. 255;* miner, loading coal in mine, killed by material falling from roof; statutory action; judgment for plaintiff for \$3,000 *reversed* for erroneous instruction based on matters not specified in declaration.

*Consolidated Coal Co. of St. Louis v. Young, Adm'r, 31 Ill. App. 417;* employee, loading coal into boxes, killed by fall of clod; judgment for plaintiff *reversed*.

*McLean County Coal Co. v. McVey, Adm'r, 38 Ill. App. 158;* minor employee, seventeen years old, killed by the fall of a post in the mine; judgment for plaintiff *affirmed*.

*Illinois Fuel Co. v. Parsons, 38 Ill. App. 182;* employee injured while ascending in cage in mine; judgment for plaintiff *reversed* for erroneous instructions.

*Evans v. Chessmond, 38 Ill. App. 615;* employee injured by fall of rock from roof of coal mine; judgment for plaintiff *reversed*; assumption of risk; contributory negligence.

*Chicago, Wilmington & Vermilion Coal Co. v. Peterson, 39 Ill. App. 114;* fall of rock upon miner in coal mine; judgment for plaintiff *reversed*; question of release. See subsequent decision in 45 Ill. App. 507, where release was held properly obtained and judgment for plaintiff *reversed*.

*Muddy Valley & Manufacturing Co. v. Phillips, 39 Ill. App. 376;* employee injured by explosion of gas in coal mine; judgment for plaintiff *affirmed*.

*Consolidated Coal Co. of St. Louis v. Scheller, 42 Ill. App. 619;* employee in coal mine injured by slate falling from roof; judgment for plaintiff for \$12,000 *reversed* for several errors.

*Consolidated Coal Co. of St. Louis v. Bonner, 43 Ill. App. 17;* driver in coal mine injured by door which closed upon him; judgment for plaintiff *reversed* on ground of carelessness of plaintiff, etc.

*Crown Coal Co. v. Hiles, 43 Ill. App. 310;* employee, shoveling coal under chute, injured by fall of lump of coal; defective appliance; judgment for plaintiff *affirmed*.

*Girard Coal Co. v. Wiggins, 52 Ill. App. 70;* miner injured by fall of descending cage in mine; judgment for plaintiff *affirmed*.

See also *Girard Coal Co. v. Cloyd; Girard Coal Co. v. Sinnott and Girard Coal Co. v. McKnight*, actions tried with *Girard Coal Co. v. Wiggins* arising out of the same accident as in the Wiggins case, and each of them *affirmed* with the Wiggins case. See 52 Ill. App. 70.

*Colfax Coal & Mining Co. v. Johnson, 52 Ill. App. 383;* laborer, in mine, attempting to lower log injured by chain breaking and log falling upon his leg; judgment for plaintiff for \$2,000 *reversed*; insufficient evidence that chain was defective and how or why accident happened not shown.

*Springside Coal Mining Co. v. Grogan, 53 Ill. App. 60;* laborer digging in

mine struck and killed by heavy barrel, which was blown by a sudden gust of wind into the mouth of the pit; judgment for plaintiff for \$5,000 reversed for erroneous instructions.

#### 11. Minor employees injured — Various causes.

Glover *v.* Gray, 9 Bradw. (Ill. App.) 329; boy, twelve years old, injured by arm catching in planing machine; judgment for plaintiff reversed for erroneous instructions.

Shedd *et al. v.* Moran, 10 Bradw. (Ill. App.) 618; minor employee killed by fall of derrick in ice house; judgment for plaintiff for \$3,750 reversed for erroneous instructions.

Fanter (by next friend) *v.* Clark *et al.*, 15 Bradw. (Ill. App.) 470; boy, fourteen years old, trying to remove splinter from planing machine, injured by his hand being drawn into revolving knives; judgment on verdict directed for defendants reversed, the case being one for a jury.

North Chicago Rolling Mills Co. *v.* Benson, Adm'r, 18 Bradw. (Ill. App.) 194; minor employee, sixteen years old, a switchman's helper, killed while coupling cars; judgment for plaintiff reversed; erroneous instructions; fellow-servant, etc.

J. W. Middleton Company *v.* Roycroft, Adm'r, 33 Ill. App. 381; minor employee killed by falling down elevator shaft; judgment for plaintiff affirmed.

Kolb (by next friend) *v.* Chicago Stamping Co., 33 Ill. App. 488; minor employee injured by fingers being cut off by machinery in stamping shop; judgment directed for defendant affirmed, the risks being obvious and incident to employment.

Goss & Phillips Mfg. Co. *v.* Suelau (by next friend), 35 Ill. App. 103; boy falling from box and coming into contact with circular saw and leg injured; judgment for plaintiff reversed, the evidence not justifying verdict.

Goldberg (by next friend) *v.* Schrayer, 37 Ill. App. 316; minor employee injured by machinery; judgment for defendant reversed, question being for jury on promise to repair.

Ludwig (by next friend) *v.* L. C. Huck Malting Co., 46 Ill. App. 494; minor employee injured by defective ladder; judgment for defendant affirmed.

Scott *et al. v.* McMenamin, a minor, etc., 51 Ill. App. 121; minor employee, sixteen years old, employed in defendant's store to operate elevator, struck by weights of descending car while cleaning elevator of which he had charge; judgment for defendants reversed for erroneous instructions as to degree of care required of master and minor employees.

St. Louis Pressed Brick Co. *v.* Kenyon, 57 Ill. App. 640; minor employee, eighteen years of age, injured by right arm being caught and crushed in gearing of pressed brick machine, on which he was working; judgment for plaintiff for \$5,000 reversed; contributory negligence; fellow-servant.

Nelson Manufacturing Co. *v.* Stoltzenburg (by next friend), 59 Ill. App. 628; minor employee injured by hand being cut off by a six-saw wood-cutting machine; judgment for plaintiff affirmed.

Fisher (by next friend), *v.* The Nubian Iron Enamel Co., 60 Ill. App. 568; minor employee, fourteen years of age, burned by explosion of gases in the kettle-room in defendant's factory; defective window; failure to warn employee of danger; judgment for plaintiff affirmed.

Eckels, Adm'r, *v.* Chicago Ship Building Co., 63 Ill. App. 436; minor employee, thirteen years old, fatally injured by arm being drawn into gearing of machinery; judgment for plaintiff affirmed.

*Swift & Co. v. Rutkowski* (by next friend), 67 Ill. App. 209; minor employee injured by act of incompetent servant; judgment for plaintiff affirmed; employment of incompetent servant proximate cause of injury.

### 12. Scaffolding, etc., accidents.

*Hale Elevator Co. v. Trude*, Adm'r, 41 Ill. App. 253; employee killed by fall of plank used in the tackle for erecting elevators in a building; defective appliances; judgment for plaintiff affirmed.

*St. Clair Nail Co. v. Smith*, 43 Ill. App. 105; person employed to do certain work injured by fall of defective platform; judgment for plaintiff for \$2,350 affirmed.

*McCarthy v. Muir*, 50 Ill. App. 510; scaffolding accident; obvious danger; judgment for plaintiff reversed.

*Rice & Bullen Malting Co. v. Paulsen*, 51 Ill. App. 123; carpenter, employed upon construction of malt elevator, injured by breaking his leg by falling with plank from scaffolding; judgment for plaintiff for \$1,000 affirmed.

*Clark and Loveday v. Liston*, 54 Ill. App. 578; employee injured while tearing down building; judgment for plaintiff reversed; exercise of due care by plaintiff might have avoided injury; master not bound to furnish safe place to work in such a case, but only bound not to send him to place known to be dangerous.

*Campbell v. Mullen*, 60 Ill. App. 497; employee working on roof of building stepping upon unfastened side piece of terra cotta and falling to ground; judgment for plaintiff reversed, failure of plaintiff to exercise due care; notice of defects.

*East St. Louis Ice & Cold Storage Co. v. Sculley*, 63 Ill. App. 147; employee injured while assisting in raising a platform by reason of the fall of a heavy piece of timber upon his head; judgment for plaintiff reversed for erroneous instructions.

*Lehigh v. World's Columbian Exposition*, 67 Ill. App. 27; painter, at work on one of the World's Fair buildings, injured by falling from scaffold; erroneous instruction to find for defendant; judgment reversed.

### 13. Miscellaneous.

*St. Louis Bolt & Iron Co. v. Burke*, 12 Ill. App. 369; employee, between coal cars on track connecting defendant's rolling mill with railway, struck by moving cars; judgment for plaintiff reversed; contributory negligence.

*St. Louis Bridge Co. v. Fellows*, Adm'x, 31 Ill. App. 282; switchman, in defendant's employ, injured by derailment of engine on which he was riding; defective track alleged; judgment for plaintiff for \$5,000 reversed, the evidence not justifying verdict. See also subsequent appeal in the *FELLOWS* case, 39 Ill. App. 456, where judgment for plaintiff was again reversed.

*Knickerbocker Ice Co. v. De Haas*, 37 Ill. App. 195; employee injured by kick from vicious horse; disobedience of orders; judgment for plaintiff reversed.

**BRAKEMAN FATALLY INJURED WHILE COUPLING CARS — DEFECTIVE APPLIANCE — RULES AND REGULATIONS — ERRONEOUS INSTRUCTIONS.** — In **CHICAGO & ALTON R. R. CO. v. BRAGONIER**, Adm'x, 119 Ill. 51 (1886), appeal from judgment in the Appellate Court for the Third District, affirming judgment for plaintiff in the Circuit Court of De Witt

county, judgment was *reversed* for erroneous instructions. The case is stated in the opinion by SCOTT, J., as follows:

" This suit was brought by Elsie Bragonier, administratrix of the estate of William Bragonier, deceased, against the Chicago and Alton Railroad Company, to recover damages resulting to the next of kin on account of the death of the intestate, which it is alleged was caused by the negligent conduct of defendant. There have been three trials of the cause in the Circuit Court, in each of which plaintiff succeeding in obtaining a judgment against defendant. The first and second judgments were reversed by the Appellate Court for the Second District, on the appeal of defendant, but the last one was affirmed, and defendant brings the cause to this court on its further appeal.

" Of course there can be no controversy in this court as to the facts of the case. It will be understood the trial court and the Appellate Court have found every fact the evidence tends to establish, in favor of plaintiff, and the finding of such facts by the latter court, under the statute, is conclusive in this court.

" The intestate had been, and was at the time of receiving the injury which caused his death, a brakeman on defendant's railroad, and was so employed at the time. On the morning of the 8th of August, 1879, the intestate was one of the number that were designated by the proper officers to go upon what is called a ' wild ' freight train, from Roodhouse to St. Louis. The usual number of men were assigned to the train, and they were directed to leave a few minutes after two o'clock on that morning, which they did. After leaving Roodhouse, going south, the first stopping place was the Chicago, Burlington and Quincy railroad crossing, about one-half of a mile from Whitehall. The train then went on to the yards at Whitehall, where it was intended some cars should be left. In doing that work the train was separated, and the car that injured the intestate was set back on the main line. At that point there was a slight down grade, and to prevent this car from moving forward of its own weight, one of the brakemen 'chucked' it. After the cars had been set off, the engineer moved back on the main line, that he might hitch to this particular car. It was the duty of the intestate to make the coupling, which he undertook to do. When the engine moved back to this car, the coupling link failed to enter the bumper, and so the coupling was not made. The striking of the engine, however, knocked the car back some distance, perhaps twenty or thirty feet. It seems the link did not enter the draw-head because it had not been adjusted to the proper height. Perceiving the difficulty, the intestate undertook to change the link into another

pocket, so that the coupling could be made. While engaged in that work, the car that had been pushed back by the concussion moved forward again of its own weight, and struck him, inflicting the fatal injury. It is averred in one count of the declaration, the car that caused the injury was unfit for use, in that the brake ratchet was broken and lost, in consequence of which the car could not be controlled; that intestate did not know of such defect, and that defendant knew, or by the exercise of a high degree of care might have known, of the existence of such defect in time to have had the same repaired. In another count it is averred, the ratchet wheel was so imperfectly fitted and constructed, the dog would not fall in place. The original and amended declaration contains quite a number of counts, in all of which some defect in the ratchet, or dog, or perhaps both of them, is averred, but no other defect in the car is stated. In most, if not all, of the counts, it is averred, by reason of the defect in the ratchet wheel the brake could not be set, and consequently the car was not subject to control.

"At the trial, two questions arose in the case as made by the declaration: First, was plaintiff himself guilty of negligence, or, what is the same thing, did he observe ordinary care for his personal safety; and second, was defendant guilty of negligence in regard to that which caused the injury. It is conceded the facts are within the province of the jury to find, and the law applicable to the facts is to be declared by the court. It is for this reason, if the court misdirects the jury as to the law applicable to the facts, it is error. Applying these obvious and well understood principles, there is manifest error in this record.

"Before coming to consider some of the propositions of law which the court stated to the jury as fixing the liability of defendant for the death of plaintiff's intestate, it will be necessary to recur to some of the principal facts which the evidence tends to establish, and which must therefore be regarded as having been so found. The car that was the cause of the accident did not belong to defendant. It was a 'Blue Line' car, and belonged to the West Wisconsin Railroad Company. It came on defendant's road at Joliet, on the night of 2d of August, and reached Bloomington at 3:25 o'clock the next morning. Left Bloomington at 8:40 o'clock the same day, and went to Jacksonville. It laid there until the afternoon of August the 7th, when it was taken to Roodhouse, and from there it was taken to Jerseyville on the 8th. It left Roodhouse, after having remained there about nine hours, at 2:18 a. m., on the morning of the 8th, for Jerseyville, and in less than an hour thereafter the intestate received the injury from which he died. It appears the

company had car inspectors on its line of road over which the car passed, at Joliet, Dwight, Bloomington and Roodhouse, but not at any other stations. The duties of car inspectors are not prescribed by any written rules, but the duties which they are expected to perform were sufficiently proved both by plaintiff and defendant. While it is their duty to make reasonably thorough examinations of all cars that come to the stations where they are located, their examination in the first instance is most generally confined to the running and hauling gear of the cars, and unless their attention is called to a defect in the car by the train men, they seldom go on top of a car to make examination. Of course, any defects that can be discovered must be reported. It is expected that all defects that can only be discovered by going on the top of the cars will be reported to them by the trainmen. Where the principal shops are located the most thorough examination of cars is made by car inspectors. It is not practicable to make a close examination of the ratchet wheel and dog on freight cars without going upon the top of the car.

"Rule 58, given in evidence, is in relation to the duties of conductors and trainmen. A copy of it is placed in the hands of all employees that have anything to do with the running of trains. It provides: 'Conductors and trainmen must be in attendance at the trains one hour before leaving time, and know personally that everything connected with their trains is in perfect order.' Another rule makes it the duty of every employee to exercise the utmost caution to avoid injury to himself or his fellows, especially in the switching or other movements of cars or trains. While these rules enacted by the company exact a high degree of vigilance and watchful care of all trainmen, still they impose no higher duties than the law itself would impose upon them in the absence of all written or printed rules. Such written rules are important, as they make known definitely to all such employees their specific duties. It is the special duty of a brakeman to assist in the control and management of trains. The stopping of heavy freight trains is done largely by the use of the brakes. It is known to every brakeman that it is the duty to manage the brakes, and in that way to assist in stopping and otherwise control the running of these heavy freight trains. His duty in that respect can only be performed by means of efficient brakes. On freight trains brakes are, and can be, put on and let off only by trainmen employed for that purpose. While they have other duties to perform, managing of the brakes on freight trains is amongst the most important. As brakemen are expected on such trains to constantly use the brakes, it becomes

their reasonable duty to see that they are always in order for working, otherwise there would be no safety for the service. It is as much the duty of a brakeman to observe that the brakes which he is expected to handle are in working order, as it is that of the engine driver to see that his engine is in order for use. All employees in these respects must be held to a high degree of care to insure any safety at all in railroad service. This is not declaring any new doctrine. It is simply the application of well settled principles, and nothing more. In Ill. Cent. R. Co. v. Jewell, 46 Ill. 99 (1), it was held it was the duty of a brakeman to see that the brake was in a fit condition for use, and the company was not to suffer for the neglect of such duty. It was said the condition of the brake was a matter under the special care of the brakeman, and it was his business at all times to see that it was in a fit condition for use, and report defects to the company. The same reasonable rule was declared in Toledo, W. & W. R. Co. v. Eddy, 72 Ill. 138 (2). The

1. In ILLINOIS CENTRAL R. R. CO. v. JEWELL, ADM'X, 46 Ill. 99 (1867), plaintiff's son, a brakeman, fatally injured while performing his duties, judgment for plaintiff in the Circuit Court of Cook county was *affirmed*. The rulings of the court are stated in the syllabus to the official report as follows:

"A railroad company will not be held liable for injuries sustained by one of its servants, in the course of his employment, when such injuries resulted from his own neglect to perform a duty, the performance of which might have avoided the accident.

"So where a brakeman was thrown from a car and killed, it being alleged the accident was caused by a defect in the brake, the nut which kept the wheel in its place on the upright shaft having become loose, and in the effort to work the brake the wheel came off, and the deceased was thrown to the ground: *Held*, it was the duty of the brakeman to see that the brake was in a fit condition for use, and the company was not to suffer for his neglect of duty.

"But if it appear that the brakeman was thrown from the train, by reason of the great oscillation produced by the sudden application of the brake, while

the train was running at a high rate of speed, on a down grade, on approaching a station — the wheel giving away in his attempt to apply the brake, and he was precipitated to the ground, and killed — the incompetency of the engine-driver, as a wild, reckless runner, being known to the company, it is *held*, the company would be liable for the injury resulting therefrom."

2. In TOLEDO, WABASH & WESTERN R'y Co. v. EDDY, 72 Ill. 138 (1874), employee injured by falling from a ladder furnished by the railroad company for the performance of his duties, judgment for plaintiff in the Circuit Court of Champaign county was *reversed* for erroneous instructions as to duty of railroad company, etc. The court said: "The third instruction states that it is an implied contract by the company, with their servants, that they will keep their road and apparatus in safe repair, and in such condition that all of their machinery, in operating the road, can be used with safety to their employees. This instruction, under the evidence in the case, was not accurate. The evidence shows that appellee was in constant use of the ladder, and that no one

defect insisted upon in this latter case was in the ladder attached to the car for the use of the employees. It was said the evidence showed plaintiff had been in the constant use of the ladder, and it was therefore his duty to know that it was in repair, and if not, to have reported it to the proper person, for repair. It was for that reason held, that an instruction that stated it is an implied contract by the company with their servants that they will keep their road and apparatus in safe repair, and in such condition that all of their machinery in operating the road can be used with safety to their employees, was not accurate, under the evidence. The rule of law undoubtedly is, that it is primarily the duty of the company to provide good, safe and proper machinery, so far as reasonable skill and diligence can construct it; but when that duty has been once performed, it is a duty devolving on the servants operating it, to observe that it is in repair, or report it to the company. There is no reason why employees should be relieved from duties the law has heretofore imposed upon them, nor should their obligation to be watchful be relaxed. There are many cogent reasons why both the company and employees should be held to a strict performance of their respective duties and obligations to each other and to the public.

"In view of these well understood principles, and in view of the evidence, some of the instructions asked by plaintiff ought not to have been given. Many of them were highly calculated to mislead the jury as to the law applicable to the facts. The seventeenth instruction of the series is radically wrong. It not only does not state the law accurately, but it was calculated to mislead the jury in their investigation of the case. It is as follows:

"That if the jury believe, from the evidence, that the printed rules of the company requiring trainmen to examine their trains

else, for some time previously, had used it. This being so, it was the duty of the appellee to see and know that the ladder was in repair, and if not, to have reported it to the proper person for repair. He had no right to act with recklessness in using machinery out of repair, and if he received injury thereby, to hold the company responsible for the injury resulting from his carelessness or neglect of duty in not reporting it out of repair. Ill. Cent. R. R. Co. v. Jewell, 46 Ill. 99. In that case it was held to be the duty of a servant to see that the machinery which he

uses is in repair, and when not, to report it to the company, and that it is negligence in him to fail to do so, and the company would not be liable. See also Toledo, P. & W. R'y Co. v. Conroy, 68 Ill. 560. This instruction should have been modified before it was given. The company are bound to provide good, safe and proper machinery, so far as reasonable skill and diligence can construct it. But, when so provided, it is a duty devolving on the servants to see that it is in repair, or report it to the company." \* \* \*

were habitually disregarded by the company itself — that is, if the officers of the company having charge of the freight trains habitually caused such trains to be made up and sent out on the company's business, after being made up, without affording brakemen an opportunity to examine the train — such fact, if proven, would cause the rule to lose its authority over the brakemen — in other words, the rule must be obeyed by the master as well as by the servant, or it ceases to be operative as to both."

" This instruction, on its face, is so obviously erroneous and vicious in the propositions it states, it would seem to be wholly unnecessary to remark upon it. It assumes there is evidence that the officers of the company having charge of freight trains habitually caused such trains to be made up, and sent out after being so made up, without affording brakemen an opportunity to examine them. This is not the fact. There is not a particle of evidence in this record that shows, or even tends to show, the officers ' habitually caused ' freight trains to be made up and sent out without affording brakemen an opportunity to examine them. But the conclusion stated does not follow from the alleged misconduct of the officers — that is, the ' rule must be obeyed by the master as well as by the servant, or it ceases to be operative as to both.' Exactly what is meant by this proposition is not readily understood. The rule was never intended to have any application to the management of the company. It relates exclusively to conductors and trainmen. If it means that negligent conduct on the part of the officers whose duty it is to make up and send out freight trains would relieve the company from the obvious duty to cause its cars to be inspected, nothing could be more erroneous or hurtful to railroad service. As before stated, the rule imposes no higher duty upon brakemen than the law itself imposes in regard to the inspection of that part of the machinery of cars which they are required to use in performing their customary work, and it would be a most dangerous doctrine to hold that the omission of duty by other employees would relieve them from the duties and obligations the law exacts of them. The public exigency requires of all railroad employees a high degree of care in the running and management of trains, and the omission of duty by one servant cannot excuse another from his obligation to observe care — otherwise railroad service would be most dangerous both to freight and passenger traffic.

" In this connection it is proper to remark, the objection taken by defendant to the evidence permitted to go to the jury, that some, and, perhaps, a good many, brakemen omitted to observe rule 58, should have been sustained. That testimony was clearly

inadmissible. It cannot be that the omission by one servant to perform his duty would afford the slightest excuse for the same negligent conduct in another employee. No matter how many other brakemen may have neglected to observe the rule, it was the duty of the intestate to conform to it as near as practicable, and any instruction that advised the jury he might be excused from the performance of his duty in that respect, was positively erroneous. It may also be further remarked in this same connection, that while plaintiff's counsel disclaimed any purpose to prove what were the customary or usual duties of brakemen on defendant's road, he was permitted to and did prove what was termed the 'work' of brakemen. The word 'work,' in the sense used, could mean nothing else than 'duty.' As used, the words are convertible terms, and obviously mean the same thing. Either party had the right to prove what were the customary and usual duties of brakemen, as to the inspection of the brakes, but the privilege was denied, by the rulings of the court, to defendant. In this there was error." \* \* \*

Other instructions also held to be erroneous.

#### Notes of cases relating to injuries to brakemen.

##### *Brakeman run over while attempting to couple engine to cars — Defective track.*

In PENNSYLVANIA COMPANY v. HANKEY, 93 Ill. 580 (1879), brakeman injured, judgment for plaintiff for \$10,000 in the Circuit Court of Cook county was reversed on the ground of contributory negligence. Plaintiff was attempting to change a link attached to an engine to couple the engine to a train of cars while it was being backed over an unballasted part of a side-track, the ties being above ground, and while so doing plaintiff's foot was caught between one of the ties and the brake-beam at the rear of the tender, whereby he was thrown under the wheels and both of his feet crushed. The accident occurred in broad daylight and the conditions of the track could have been seen by him.

##### *Brakeman killed while between cars.*

In TOLEDO, WABASH & WESTERN R'Y CO. v. ASBURY, ADM'X, 84 Ill. 429 (1877), brakeman killed by being caught between platform of cars while trying to couple same, judgment for plaintiff in the Circuit Court of Sangamon county for \$3,000 was reversed on the ground of contributory negligence and assumption of risk.

##### *Brakeman on top of car coming in contact with bridge.*

In CHICAGO & ALTON R. R. CO. v. JOHNSON, 116 Ill. 206 (1886), brakeman on top of freight car, while passing through a covered bridge, struck and injured by coming in contact with roof of bridge, judgment for plaintiff in the Circuit Court of McLean county, affirmed by the Appellate Court for the Third District, was affirmed.

##### *Brakeman killed by being knocked off train while passing bridge.*

In CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS R'Y CO. v. WALTER, ADM'R, 147 Ill. 60 (1893), brakeman killed by being knocked off freight train while

passing railroad bridge, judgment of Appellate Court for the Fourth District, affirming judgment for plaintiff in the Circuit Court of Wabash county for \$2,000, was affirmed. See also 45 Ill. App. 642.

*Brakeman on top of car struck by object on bridge.*

In *WABASH R'Y CO. v. ELLIOTT*, 98 Ill. 481 (1881), brakeman on top of car struck on the head by an iron rod or timber placed across the top of the west end of a railroad bridge, judgment for plaintiff in the Circuit Court of Brown county for \$2,500, affirmed in the Appellate Court for the Third District, was affirmed.

*Brakeman on ladder of car struck by pole near track.*

In *CHICAGO & IOWA R. R. CO. v. RUSSELL*, ADM'R. 91 Ill. 298 (1878), brakeman, climbing down ladder of car to throw switch, struck by a standing telegraph pole, eighteen inches from the car, and knocked between the cars, run over and killed, judgment for plaintiff in the Circuit Court of Kane county was affirmed.

*Brakeman injured by defective ladder on car.*

In *CHICAGO & ALTON R. R. CO. v. PLATT*, 89 Ill. 141 (1878), brakeman injured by defective ladder on a stock car, the injury necessitating amputation of the leg, judgment for plaintiff in the City Court of Alton for \$3,500 was reversed, it not being shown that the defendant knew or might have known of the defect in the ladder.

**CAR REPAIRER STRUCK BY CAR — NEGLIGENCE OF ENGINEER — FELLOW-SERVANT — DEMURRER.** — In *VALTEZ v. OHIO & MISSISSIPPI R'Y CO.*, 85 Ill. 500 (1877), car-repairer injured, judgment against plaintiff, on demurrer to the evidence, in the Circuit Court of St. Clair county, was affirmed (1). The court (per BREESE, J.) said: "What are the material facts

1. See also the following cases relating to car repairers, car cleaners and car inspectors:

In *ST. LOUIS, ALTON & TERRE HAUTE R. R. CO. v. HOLMAN*, 155 Ill. 21 (1895), car-repairer engaged in the performance of his duties injured by car, which was being jacked, falling on him caused by the car being struck by another car which was struck by other cars which had been struck with some force by a backing-engine, judgment for plaintiff in the Appellate Court for the Fourth District (53 Ill. App. 617), affirming judgment for \$3,000 in the Perry Circuit Court, was affirmed.

In *QUICK v. INDIANAPOLIS & ST. LOUIS R'Y CO.*, 130 Ill. 334 (1889), carpenter engaged in repairing car in the repair-yard injured while under the car by

reason of an engine backing into the yard and attempting to couple onto the car, judgment of the Appellate Court for the Third District, affirming judgment for defendant on the special findings, notwithstanding general verdict for plaintiff for \$500 in the Circuit Court of Coles county, was reversed, it being error to enter judgment on the special findings. See 29 Ill. App. 143.

In *CHICAGO & WESTERN INDIANA R. R. CO. v. BINGENHEIMER*, 14 Bradw. (Ill. App.) 125 (1883), car cleaner, attempting to get onto car for purpose of performing his duties, injured by the car being backed, whereby he was thrown under wheels of car and his leg was cut off, judgment for plaintiff in the Circuit Court of Cook county was reversed, for erroneous instruction that

admitted by the demurrer? That plaintiff was in the employment and service of the defendant, together with other servants and employees, in repairing cars, at its depot in East St. Louis; that the usual place of making such repairs was in a shed, into which one or more tracks of the company entered; that the person in charge of the repairing gang, one Rein, directed this car, which required new springs to be attached, should be placed on the 'dead track,' so called for the reason that cars not in use were placed there, and where there would be less switching and less danger than in the shed; that while he was so employed, he, by the negligence and carelessness of another servant of the company, employed on the same track at this depot, was badly injured. This is the substance of the proof, and the question, so often decided by this court, of *respondeat superior*, arises. It is unnecessary to cite the numerous cases wherein this court has held that one servant cannot recover from the common master, for injuries done by a fellow-servant in the same line of employment, if the master has selected trusty and competent servants, and of this there is no dispute. The accident was caused by the driver of a switch engine, there employed, mistaking the signal of the yard master. Plaintiff knew, when he entered into the employment of the company, the hazard attending his vocation, and, for the emoluments of his position, assumed the usual and ordinary hazards of the service into which he entered. He knew the company employed many men, and had a right to believe some of them might be careless and negligent in the performance of a duty, and this hazard he voluntarily accepted. Those who are engaged in the service of the same master, in carrying on

it was negligence *per se* to start the car while plaintiff was boarding it, irrespective of the facts in the case.

On a subsequent trial of the BINGENHEIMER case, in the Circuit Court of Cook county, there was a verdict and judgment for plaintiff which, on appeal to the Appellate Court for the First District, was affirmed. On appeal to the Supreme Court, from the judgment of the Appellate Court, the same was affirmed. See CHICAGO & WESTERN INDIANA R. R. CO. v. BINGENHEIMER, 116 Ill. 226 (1886).

In PENNSYLVANIA COMPANY v. STOELKE, ADM'R, 104 Ill. 201 (1882), car inspector, while under car, fatally injured by car being suddenly struck by

other cars in motion, judgment of Appellate Court of First District, affirming judgment for plaintiff in the Circuit Court of Cook county for \$3,000, was reversed, for erroneous exclusion of question to witness as to custom of letting cars into the yard, and for erroneous instruction in summing up facts on one side only.

In CHICAGO & ALTON R. R. CO. v. HOYT, 122 Ill. 369 (1887), car inspector injured by parting of cars caused by sudden start of engine, judgment for plaintiff in the Circuit Court of McLean county, affirmed by the Appellate Court for the Third District, was affirmed. See 16 Bradw. (Ill. App.) 237.

and conducting the same general business, in which the usual instrumentalities are used, may justly be considered fellow-servants. A proper test of the existence of this relation may be to inquire whether the negligence of the one is likely to inflict injury on the other, as claimed by appellee in its argument. This is not unlike the case of the Chicago & Alton R. Co. *v.* Murphy, Adm'x, 53 Ill. 336 (1). It was there said, where the ordinary duties and occupations of the servants of a common carrier are such that one is necessarily exposed to hazard by the carelessness of another, they must be supposed to have voluntarily taken the risks of such possible carelessness when they entered the service, and must be regarded as fellow-servants within the rule.

"It is very plain appellant knew, when he entered the service of this company, he would be exposed to the action of other servants of the company; that, on an emergency, he might be called upon to make repairs, as in this case, not in the shed, but on a track, and be exposed to the acts of engine-drivers and others, whose business called them onto the same track. Admitting, as the demurrer does, all the facts and the inferences fairly to be drawn from them, there is no cause of action made out, and the Circuit Court did right in sustaining the demurrer, and its judgment must be affirmed. See Ill. Cent. R. R. Co. *v.* Modglin, 85 Ill. 481 (2). Judgment affirmed."

1. In CHICAGO & ALTON R. R. Co. *v.* MURPHY, Adm'x, 53 Ill. 336 (1870), car repairer walking along track to tool shop struck by switch engine and fatally injured, judgment for plaintiff in the Circuit Court of McLean county was reversed, the fellow-servant rule being applied.

2. In ILLINOIS CENTRAL R. R. Co. *v.* MODGLIN, 85 Ill. 481 (1877), judgment for plaintiff in the Circuit Court of Union county for \$2,500 was reversed on the ground that the evidence did not warrant a finding of negligence against the railway company. The court (per BREESE, J.) said:

"Plaintiff was in charge of a number of hands engaged in quarrying stone, to be placed upon the construction train charged with doing the injury, and had in his charge and under his management a hand car, in which

to transport his tools for repairs at the shop in Makanda. He knew perfectly well, when he engaged in this service, what he was required to do when he used the hand-car—that as to trains upon the road, no matter of what description, his hand car was subservient, and had to give the road. On this knowledge he had acted for weeks, and to make the transit safe, he took the precaution to follow freight train No. 12, which passed the quarry at 4:30 in the afternoon, and wait at Makanda until the passenger train passed down, and then follow that train back to the quarry. This he had done for weeks. Plaintiff also knew perfectly well the movements of the construction train, for it was this train his labor, and that of the men under him, was supplying. He was acting in concert with this train, which he well knew went to and from the quarry several times in the

But Dickey, J., seems to have dissented in the Valdez case, as, in a brief opinion, he says: "It was not the province of the court, on demurrer to evidence, to determine from the evidence that plaintiff's injury came from act of a fellow-servant. That, if true, is affirmative matter of defense, and, on demurrer, could not properly be considered. Nor do I think that the car repairer is in a common employment with the engineer managing the switch engine in the yard."

**CONDUCTOR OF FREIGHT TRAIN INJURED COUPLING CARS — DEFECTIVE APPLIANCES — ASSUMPTION OF RISK.** — In **INDIANAPOLIS, BLOOMINGTON & WESTERN R. R. CO. v. FLANIGAN**, 77 Ill. 365 (1875), judgment for plaintiff for \$6,000 in the Circuit Court of Tazewell county was *reversed*. Plaintiff was a freight conductor on defendant's railroad, it being a part of his duty, when required, to couple cars. He had been directed to leave at Mansfield station four empty freight cars belonging to the B. & O. R. Co. It was about midnight when he arrived at the station and, in setting off the cars, he found it would be necessary, in order to clear the crossing, to couple one of them with a White

course of a day. He knew it was the constant practice of the construction train to back into Makanda to let No. 12 go on, and to pull out of Makanda so soon as No. 12 reached that point. The hand car, on the day of the accident, did not follow No. 12 closely, and the construction trains, as was usual with them, put out at the proper and usual time. No blame is chargeable up to this point. That train had the right to the road, and it was gross carelessness on the part of the plaintiff for him to be on the road with his hand car, without ascertaining that the track was clear. The construction train had no right to suppose the hand car was on the track, as it did not follow No. 12 as usual. The fault is altogether with the hand car.

"It is said no whistle was sounded, and the speed of the train was excessive. There is conflict on these points, but the law did not require this train to sound a whistle at that spot, nor did it regulate the speed of the train. But, although the law may be silent on this

point, we should be inclined to hold a railroad company, knowing or having reasonable grounds to believe there is a person on the track, or danger of a collision, guilty of negligence, if sounding the whistle or slackening the speed of the train could prevent accident. This construction train was visible by the operatives on the hand-car for more than one hundred yards, before the collision occurred, and it was but natural and reasonable for the conductor of that train to suppose the hand car would get out of the way, as it was its clear duty to do, and could have done if they had endeavored to get it off, in the first instance, on the east side of the track. We cannot, after the closest examination of the testimony, find any ground to charge defendants with negligence.

"The negligence seems to be on the other side, and however much all may regret the accident, the conclusion from the testimony is irresistible, the plaintiff was the cause of the injury." \* \* \*

Line car that had previously been standing on the side-track. Both cars had attached what are called "double buffers," the use of which is well understood by railroad men. The draw-bars in use on these cars have two apartments, to facilitate coupling with other cars of different height. Plaintiff first undertook, in his effort to make a coupling, to remove the pin in the draw-bar of the stationary car, but finding he would be unable to get it out, owing to some unexplained difficulty, before the approaching car would be upon him, he attempted, in his haste, to place the link in the lower apartment. By some most unfortunate movement, his arm was caught between the deadwood attached to the cars, and so badly crushed that it had to be amputated. In discussing the case, after stating the facts, the Supreme Court said: "The averment in the declaration is not that these cars were not in proper order, but that the original construction is faulty, in having upon them the double bumpers. If plaintiff knew such cars were in use, and that they were unsafe, he ought not to have taken service with defendant. Prior to this engagement, defendant, in common with all other railroad companies in the State, had been drawing cars of this particular make. Their character must have been generally known. They were known to be safe if care was used in operating them, but dangerous, like all railroad labor, unless unusual caution was observed." \* \* \* Plaintiff, therefore, assumed the risks incident to the service. The court said: "A very different question would arise had the injury to plaintiff been produced by a car defective and unfit for service when it was received, or had defendant suffered it, while in its possession, to become unsafe; but that question cannot arise in this case. The cars were in perfect order, so far as the evidence shows, when they were received, and hence, defendant was guilty of no negligence in receiving them upon its line of road.

"The case of Toledo, Wabash & Western R'y Co. v. Fredericks, 71 Ill. 294 (1), is cited with great confidence as being an authority exactly in point, but the decision in that case rests upon an entirely different principle. The vice that produced the injury in that case was not peculiar to a class, but to a particular car. The draw-bar was too short, and it appeared had it been the usual length the accident would not have happened. The evidence was full to the point,

1. In TOLEDO, WABASH & WESTERN R'y Co. v. FREDERICKS, 71 Ill. 294 (1874). switchman, attempting to couple tender to a caboose car, injured by his hand being caught between the dead-

wood on the engine and the "ratchet wheel" attached to the caboose car, judgment for plaintiff in the Circuit Court of Sangamon county for \$5,000 was affirmed.

any mechanic, by a casual inspection, could tell the particular coupling attached to the car was dangerous before it was ever used. From the notorious bad reputation, it was concluded the company must have known the fault existed in the draw-bar. It could not be readily discovered by any one just entering upon the service. Plaintiff had been but a brief period in the employment of the defendant, and it was thought he did not know of the defect. Had it been observable by ordinary care, it would have been the duty of plaintiff to have quit the service. Failing to do so, the law would presume he was willing and did assume the hazards. The decision is placed on that distinct ground. The case at bar is clearly distinguishable from the Fredericks case, 71 Ill. 294, both in the facts and the principle upon which the decision is placed. The modifications to defendant's instructions seem to have been made under a misapprehension of the doctrine of comparative negligence as declared by this court. The court added to the ninth instruction these words: "unless defendants were guilty of more negligence, as aforesaid, in causing the injury." This is not the law. The decisions in this court recognize no such rule of liability, in cases of mutual negligence, as that of a greater degree on the part of the defendant. We have had occasion so frequently to declare the doctrine on that question, we deem it unnecessary to do more than to refer to our former decisions." \* \* \* Judgment reversed. Opinion by SCOTT, J. (JOHN B. COHRS, appeared for appellant; WHITNEY & FOSTER and ROBERTS & GREEN, for appellee.)

**Notes of cases arising out of accidents to conductors and other employees while coupling and uncoupling cars.**

*Freight conductor attempting to uncouple car — Absence of ladder.*

In CHICAGO, BURLINGTON & QUINCY R. R. Co. v. WARNER, 108 Ill. 538 (1884), freight conductor injured while attempting to uncouple a car having no ladder or steps or handles at its end, which accident resulted in the loss of the plaintiff's arm, judgment for plaintiff for \$5,000 in the Circuit Court of Cook county, which was affirmed by the Appellate Court for the First District, was reversed for error in the trial court's refusal to give the following instruction asked by defendant. "That it was the duty of the plaintiff, before attempting to uncouple the car in question, to use ordinary and reasonable care to ascertain whether it was safe to do so or not while the train was in motion; and if the jury believe, from the evidence, that it was not safe for the plaintiff to uncouple said car at the time he attempted it, and the plaintiff knew, or might by the exercise of ordinary care have known, that it was not safe to attempt it, then the plaintiff cannot recover, and the verdict should be for the defendant."

See also subsequent decision in the WARNER case, 22 Ill. App. 436.

*Car coupler and switchman caught by brake of car.*

In CHICAGO & NORTHWESTERN R. R. Co. v. WARD, 61 Ill. 130 (1871), car

coupler and switchman about to couple cars caught by brake, which was out of order, and thrown to the ground and run over and fatally injured, judgment for plaintiff in the Circuit Court of Cook county was *reversed* on the ground of assumption of risk and erroneous instructions as to the duty of railroad company as to furnishing safe machinery.

*Employee injured while uncoupling car of another company.*

In CHICAGO, BURLINGTON & QUINCY R. R. Co. v. AVERY, 109 Ill. 314 (1884), employee of defendant injured while attempting to uncouple car belonging to the Keokuk, St. Louis & N. W. R. R. Co., in one of defendant's yards, plaintiff's right thumb being caught and crushed by and between the deadwood and coupling pin of the car, the appliances on such car being defective, judgment of the Appellate Court for the Third District, affirming judgment for plaintiff in the Circuit Court of Adams county, was *affirmed*. It was held to be the duty of railway companies using cars of other companies to see that they are safe, in respect to its own employees. See 8 Bradw. (Ill. App.) 133.

*Minor employee killed while coupling cars.*

In ILLINOIS CENTRAL R. R. CO. v. REARDON, ADM'R, 157 Ill. 372 (1895), minor employee killed while coupling cars in railroad yard, judgment of Appellate Court for the Second District, affirming judgment for plaintiff in the Circuit Court of Jo Daviess county for \$2,300, was *affirmed*. Affirming 56 Ill. App. 542.

*Defective brake — Employee falling from car and run over.*

In CHICAGO & EASTERN ILLINOIS R. R. CO. v. KNEIRIM, ADM'X, 152 Ill. 458 (1894), "helper" in railroad yards engaged in catching and coupling cars, falling from a car in motion owing to defective condition of brake which he tried to set, and run over and fatally injured, judgment of Appellate Court for the Third District, affirming judgment for plaintiff in the Circuit Court of Vermilion county for \$5,000, was *affirmed*.

*Switchman caught between cars while coupling same.*

In CHICAGO & EASTERN ILLINOIS R. R. CO. v. RUNG, 104 Ill. 641 (1882), yard switchman, engaged in coupling some coal cars in the company's yards, injured by a sudden movement of the engine occasioned by its throttle valve being out of repair, whereby his hand was caught between the deadwoods of the two cars and one of his fingers lost, judgment of the Appellate Court for the First District, affirming judgment for plaintiff in the Superior Court of Cook county for \$2,000, was *affirmed*.

*Switchman coupling cars run over by car — Defective track.*

In FOSTER v. CHICAGO & ALTON R. R. CO., 84 Ill. 164 (1876), switchman, while coupling cars, injured by foot catching on track and leg cut off by the wheels of the car, judgment for defendant in the Circuit Court of Cook county was *affirmed*, the plaintiff being familiar with the dangers and guilty of negligence in the manner in which he attempted to couple cars.

In CHICAGO & EASTERN ILLINOIS R. R. CO. v. HINES, ADM'X, 132 Ill. 161 (1890), switchman, while coupling cars in railroad yard, run over and killed by reason of his foot catching between the ties on a side-track, judgment of the Appellate Court for the First District, affirming judgment for plaintiff in the Circuit Court of Cook county, was *affirmed*. See 33 Ill. App. 271.

*Switchman coupling cars — Defective appliance — Knowledge of defect.*

In CHICAGO & ALTON R. R. CO. v. MUNROE, 85 Ill. 25 (1877), switchman injured while coupling cars, due to defective appliance, judgment for plaintiff in the Circuit Court of McLean county was reversed, where it appeared that he had knowledge of defect and continued in defendant's service without objection.

*Switchman injured uncoupling car — Assumption of risk.*

In TOLEDO, WABASH & WESTERN R'Y CO. v. BLACK, 88 Ill. 112 (1878), switchman, attempting to couple freight car to caboose, injured by hand catching between the draw-bars, judgment for plaintiff in the Sangamon county Circuit Court was reversed on the ground that he had ample opportunity to discover the danger, if any, and assumed the risk.

**CONDUCTOR KILLED IN COLLISION WITH TRAIN OF ANOTHER COMPANY AT CROSSING — SIGNALS — ERRO-NEOUS INSTRUCTIONS.** — In CHICAGO & NORTHWESTERN R'Y CO. ET AL. v. SNYDER, ADM'X, 117 Ill. 376 (June, 1886), conductor in employ of the Chicago & N. W. R'y Co., having charge of engine and car belonging to the Chicago, Milwaukee & St. Paul R'y Co., fatally injured in collision with another train of the latter company at a crossing, caused by alleged failure of joint agent or employee at said crossing to give proper signals, judgment for plaintiff for \$5,000 in the Superior Court of Cook county, affirmed by the Appellate Court of the First District, was reversed (1), on the ground of error in the following charge given by the court:

"The jury are instructed that if they find, from the evidence, that John H. Snyder, the deceased, was injured by a collision of the cars of the Chicago, Milwaukee & St. Paul R. Co., and the Chicago & Northwestern R'y Co., the defendants in this case, at the crossing of the railroad tracks of the said companies, in the city of Chicago, on or about the 7th day of October, A. D. 1882, and that, by reason of such injuries, he, the said John H. Snyder, afterwards, on the same day, died; and, if the jury further find, from the evidence, that said collision occurred solely by reason of the gross negligence of one H. E. Torrence, in and about the management and operating of the semaphore or signal light, at or

i. A subsequent trial of the SNYDER case resulted in verdict and judgment for plaintiff which was affirmed by the Appellate Court and, on appeal by defendant, the judgment was affirmed by the Supreme Court. CHICAGO & N. W. R'y Co. v. SNYDER, ADM'X, 128 Ill. 655 (1889).

*Conductor killed in collision between trains.* — In CHICAGO, BURLINGTON &

QUINCY R. R. CO. v. McLALLEN, ADM'R, 84 Ill. 109 (1876), conductor of freight train ordered by telegraph from assistant-superintendent to leave certain station and run to the next ahead of a passenger train then due, killed in collision between his train and the passenger train, judgment for plaintiff in the Circuit Court of Du Page county for \$4,500 was affirmed.

near the said crossing, and that at the time of such collision and injury, he, the said H. E. Torrence, was in the joint employment of the two defendant companies in and about the management and operation of said semaphore or signal light; and if the jury further find, from the evidence, that at the time of such collision and injury the said John H. Snyder was a conductor in the employ of the Chicago & Northwestern R'y Co., one of the defendants, having the control and management of the way car and engine of said last-named company in question, and was, at the time aforesaid exercising due and proper care, caution and diligence, as such conductor in and about the control and management of said way car and engine, and for his own personal safety, and that at and before the time of said collision and injury, the said John H. Snyder and H. E. Torrence were employed in different departments of labor, wholly disconnected with each other, and were not associated with each other in the performance of their respective employment, and could have no control over or influence upon the conduct of each other; and if the jury further find, from the evidence, that the said John H. Snyder left surviving him a widow, who is still living, and that such widow was pecuniarily injured by reason of the death of the said John H. Snyder as aforesaid, and that such widow is the plaintiff herein, and was, at the time of the commencement of this suit, the administratrix of the estate of the said John H. Snyder, deceased — then the jury should find both of the defendants guilty, and should give to the plaintiff such damages as, from the evidence, the jury shall deem a fair and just compensation for the pecuniary injury, if any, resulting from such death to the said widow, not exceeding the sum of \$5,000."

After disposing of objections to the foregoing instruction the court (per CRAIG, J.) said:

"There is, however, one serious objection to the instruction. It will be observed that it is averred, in both counts of the declaration, that Snyder and those engaged with him in the management of the train were in the exercise of due care, but by the instruction the jury were directed that if they find, from the evidence, that the collision occurred solely by reason of gross negligence of Torrence, the plaintiff might recover, if the jury further find, from the evidence, that Snyder was exercising due and proper care, caution and diligence as conductor of the train. Under this part of the charge to the jury, the engineer and brakeman in charge of the train, under Snyder, may have been guilty of gross negligence in the discharge of their respective duties, which may have contributed to Snyder's death, and yet the plaintiff could recover. We do not understand

this to be a sound proposition of law. If Snyder's co-employees in charge of the train under him were guilty of negligence which contributed to his death, he is chargeable with such negligence, and the negligence of those under Snyder would defeat a recovery. Suppose the brakeman had notified the engineer that they were signaled not to cross, in ample time to enable him to stop the train, but he refused to regard the notice and recklessly ran into the other train, it will scarcely be pretended that Snyder's representatives could recover."

It was also held error to refuse an instruction asked by defendant, the Chicago, M. & St. P. R'y Co., as to failure of the deceased to observe the law requiring trains to stop at intersecting crossings. On this point the court said: "The statute imposed the duty on Snyder, who had charge of the train, to bring his train to a stop not less than two hundred feet from the crossing. If he failed to comply with this requirement of the law, and such failure contributed to the injury, it is plain that the plaintiff could not recover, for the obvious reason that the deceased was guilty of negligence which contributed to the injury. In refusing the instruction, the court, in effect, held that the defendants were liable, although the jury might find, from the evidence, that if Snyder had observed the duty enjoined by the statute, the collision might have been avoided. We do not understand this to be the law." \* \* \*

**SWITCH CONDUCTOR THROWN FROM FOOTBOARD OF CAR BY SUDDEN JERK OF TRAIN — FELLOW-SERVANT — ERRONEOUS INSTRUCTIONS.** — In **COLUMBUS, CHICAGO & INDIANA CENTRAL R'Y CO. v. TROESCH**, 68 Ill. 545 (1873), appeal from judgment for plaintiff for \$10,000 in the Circuit Court of Cook county, judgment was *reversed* for erroneous instructions based on an element of liability not involved in the case, and on the ground that the fellow-servant rule applied (1). There was a former appeal where judgment for plaintiff was *reversed*. 57 Ill. 155.

In the **TROESCH** case, *supra*, the court (per SCOTT, J.) stated the case as follows: "Appellee [plaintiff below] was a switch conductor employed in the yards of the company in Chicago. He was directed by the yard-master to move a train, consisting of from six

1. The court, in the **TROESCH** case, *sequent case of Chicago & N. W. R. R. Co. v. Moranda*, 93 Ill. 302 (1879) (*re-fellow-servant rule*, citing many authorities on the doctrine, and although the case is frequently cited in the Illinois reports, yet as that doctrine has been exhaustively treated in the sub-

68 Ill. 545, discussed at length the reported in this volume of AM. NEG. CAS.), in which the Troesch case, 68 Ill. 545 (and authorities *theretofore*), is cited, it is deemed unnecessary to report the case at length in this volume.

to ten platform cars loaded with railroad iron, upon the Hoyne street switch. Appellee stood upon the front end of the forward car as the train was being pushed by the engine west on Kenzie street, at a rate of speed stated to be about seven miles per hour. Just before reaching the switch, appellee signalled the engine-driver, as he alleges, to 'slow' the speed of the train. In response to the signal given, the engine-driver either shut off the steam or reversed the engine. The action, whatever it was, caused a sudden jerk of the car, which threw appellee upon the track, where he was injured by the moving cars, from which he suffered the loss of a leg and an arm. The irreparable loss suffered by appellee has commended his cause to the patient and careful consideration of the court, but we are unable to discover any tenable ground upon which to base an affirmance of the judgment in his favor. This is a second trial had upon substantially the same evidence. Several witnesses not previously examined were introduced on the last trial, but the testimony is mainly cumulative, and presents no new phase of the case, nor does it materially strengthen the theories advanced by the respective parties." \* \* \*

ENGINEER KILLED BY EXPLOSION OF BOILER OF LOCOMOTIVE — DEFECTIVE ENGINE — RAILROAD NOT LIABLE.—In ILLINOIS CENTRAL R. R. CO. v. HOUCK, ADM'R, 72 Ill. 285 (1874), engine-driver killed by explosion of the boiler of the engine on which he was employed, judgment for plaintiff in the Circuit Court of Marion was *reversed*, the evidence failing to show negligence on the part of the railway company. The court (per SCHOLFIELD, J.) said:

"The plaintiff's intestate was an engine-driver on one of defendant's engines, engaged in hauling a water train between Big Muddy and Centralia. On December 11, 1871, as the train was going from Centralia to Big Muddy, the boiler of the engine on which the intestate was employed exploded, killing intestate and one Keen, a brakeman (1). It is alleged that the explosion was in consequence of the defective condition of the engine, and that the defendant was guilty of negligence in permitting, knowingly, a defective engine to be so employed. The finding of the jury sustained this claim.

"We are of opinion that the jury totally misapprehended the

1. The case of ILLINOIS CENTRAL R. R. Co. v. KEEN, ADM'X, 72 Ill. 512 judgment in each case was *reversed*. The KEEN case was an action for negligence (1874), was argued in connection with the Houck case (the case at bar), and the two were considered together, and the boiler of the engine, which killed

evidence, as applied to the only legitimate subject of inquiry before them, and their verdict, consequently, must be set aside.

"Although, as was held in *Ill. Cent. R. Co. v. Phillips*, 49 Ill. 234 (1), the *prima facie* presumption from an explosion is that there was negligence either in testing or putting the material together when constructed into a boiler, or that it has been negligently used, by subjecting it to too high a degree of pressure by steam, yet, when the suit is brought by the engine-driver who had charge of the engine, or his representatives, against the person or corporation owning the engine, there is no presumption in his favor that the explosion was caused by defects in the boiler rather than from its negligent use, and the burden is upon the plaintiff to show that the engine-driver was not himself guilty of negligence which caused the explosion, or, if guilty, that his negligence was slight and that of the defendant gross in that respect, when compared with each other. The burden is upon him to prove the negligence which he charges, and this is not sufficiently done by merely proving an explosion, which may as well have resulted from the negligence of the engine-driver as from that of the defendant.

"The evidence before us fails to show that the explosion resulted from the defendant's negligence." \* \* \*

**ENGINEER KILLED BY EXPLOSION OF BOILER OF LOCOMOTIVE — DEFECT — ERRONEOUS INSTRUCTION.** — In *TOLEDO, WABASH & WESTERN R'Y CO. v. MOORE*, Adm'x, 77 Ill. 217 (*January Term, 1875*), judgment for \$5,000 for plaintiff in the Circuit Court of Piatt county was *reversed*. The action was brought by Lydia F. Moore against the railway company to recover damages for the death of her husband who was killed while in the employ of the company as an engine-driver, by the explosion of an engine alleged to have been defective and unfit for use upon the road (2). The reversible error was in the trial court's giving to the jury plaintiff's third instruction, which was as follows:

plaintiff's intestate in the Houck case. caused by the explosion of the boiler of an engine, at defendant's depot.  
The court said: "There is no question but that he [plaintiff's intestate in Keen case] and the engineer, Houck, who was killed at the same time, were fellow-servants, in the same branch of employment, and if the death was caused by the carelessness of Houck, there can be no recovery."

1. The *PHILLIPS* case, 49 Ill. 234, was an action for injuries to a by-stander

2. See also the following cases relating to explosions of boilers of locomotives:

In *INDIANAPOLIS, BLOOMINGTON & WESTERN R'Y CO. v. Toy*, ADM'R, 91 Ill. 474 (1879), engineer killed by explosion of boiler of engine, judgment for plaintiff in the Circuit Court of Champaign county for \$1,950 was re-

"If the jury believe, from the evidence, that John H. Moore, the husband of the plaintiff, was an engineer in the employ of defendant at the time of his death, as a railroad engineer, on the 1st day of September, A. D., 1871, or thereabouts, and that while he was running his engine with due care and caution, the boiler of said engine burst and killed said John H. Moore; and if the jury further believe, from the evidence, that it was no part of the duty of said John H. Moore to keep the said boiler in repair or to make critical or close examination to ascertain the condition of said boiler; and if the jury believe, from the evidence, that there were agents and servants of the defendant, employed by the defendant, whose duty it was to keep said engine in a reasonably safe condition of repair for the use of said John H. Moore, then and in such case, the bursting of the said boiler, if the jury believe, from the evidence, that said boiler did burst, would be *prima facie* evidence of the negligence of the defendant; and unless the jury believe, from the evidence, that the defendant has, by a preponderance of evidence, rebutted said *prima facie* negligence, then and in such case, the jury should find for the plaintiff."

In discussing the exception to the foregoing instruction the Supreme Court said: "If the boiler exploded through the negligent manner in which the engine was managed by Moore, or if he knew or had good reason to believe the boiler was unsafe, or if, by the exercise of ordinary skill, he could have learned that the engine was defective, and still used it, there can be no pretense but such would preclude a recovery; or, if such was the case, the explosion

*versed*, the evidence failing to show a cause of action. The court (per WALKER, J.) said.

"Employers are only required to provide machinery of good material, and to have it constructed in a good and workmanlike manner. They, whether as individuals or corporations, are not insurers of their employees against injury from its use. In this case the locomotive was made of the best material, and by first-class manufacturers, and had not been used a sufficient length of time to create any suspicion of its unsafe condition, which could have been discovered by any of the tests usually employed for the purpose, and its appearance did not indicate its unsafe condition. To have

detected it, the boiler would have been greatly injured, by cutting through its walls. We are unable to see that those having charge of the road and its machinery omitted any duty, and the company cannot be held liable for the loss."

In TOLEDO, ST. LOUIS & KANSAS CITY R. R. CO. v. BAILEY, ADM'X, 145 Ill. 159 (1893), action to recover damages for death of plaintiff's intestate, an engineer in defendant's employ, caused by the explosion of the boiler of the engine, which boiler was alleged to be unsafe and insecure, judgment of the Appellate Court for the Fourth District, affirming judgment for the plaintiff for \$3,000, was *affirmed*. See 43 Ill. App. 292.

would not make out a *prima facie* case against the company; and yet the jury were told by the instruction that if the deceased used due care in running the engine, and that it was no part of his duty to make a critical examination to ascertain the condition of the boiler, the bursting would be *prima facie* evidence of negligence, which the company was bound to rebut by a preponderance of testimony. This instruction was highly prejudicial to the rights of appellant, and we cannot regard it otherwise than erroneous. It was a question of fact, for the jury to determine from the evidence, whether the accident arose from the defects in the engine, or whether it was to be attributed to the failure of the deceased to discharge a duty enjoined upon him as engineer. In the determination of this fact, the parties should have been placed before the jury, by the instructions, on equal terms; no presumption should have been indulged in favor of either. This, however, the court failed to do." \* \* \*

**ENGINEER KILLED BY BREAKDOWN OF BRIDGE—DUTY OF RAILROAD COMPANY TO FURNISH SAFE MATERIALS AND STRUCTURES.**—In **TOLEDO, PEORIA & WARSAW R'Y CO. v. CONROY**, 68 Ill. 560 (*September Term, 1873*). engineer in defendant's employ killed by the break-down of a defective bridge while a train was passing over same, judgment for plaintiff for \$1,500 rendered in the Circuit Court of Peoria county was *affirmed*. The Supreme Court case, *supra*, (per BREESE, Ch. J.) said: "The principles which rule this case have been fully stated in **Chicago & N. W. R. Co. v. Swett**, 45 Ill. 201 (1), and **Ill. Cent. R. Co. v. Welch**, 52 Ill. 183 (2), in which it was held that railroad companies are bound to furnish their servants safe materials and structures, and must keep them in proper repair; and a person entering the service of a railroad company has a right to presume

1. See **Chicago & Northwestern R. R. Co. v. Swett**, *Adm'r*, 45 Ill. 197, the case next reported in this volume of AM. NEG. CAS.

2. In **ILLINOIS CENTRAL R. R. CO. v. WELCH**, 52 Ill. 183 (1869), brakeman knocked off car by collision with a projecting awning from one of defendant's station houses as train was passing same, his left arm being broken and his head seriously injured, judgment for plaintiff in the Circuit Court of Cook county for \$10,000 was reversed on

the ground that the damages awarded were excessive.

In the Welch case, *supra*, the ruling in **Chicago & N. W. R. Co. v. Swett**, 45 Ill. 201, that railroad companies must furnish to their servants safe materials and structures, was applied and followed.

In the Welch case, *supra*, the question whether a release signed by plaintiff was procured by means of false representations was held to be for the jury to determine.

that, in these respects, the company has discharged its obligations (1). The case last cited modifies, to some extent, what was said in Swett's case. And the doctrine of that case is further qualified by what was said in Ill. Cent. R. Co. v. Phillips, 49 Ill. 234, and in Pitts., Cin. & St. L. R'y Co. v. Thompson, 56 Ill. 138, the result of which ruling is, not to hold these companies as insurers that their road and appurtenances and instrumentalities are safe and in good condition, but that they must do all that human care and vigilance and foresight can reasonably do, consistent with the modes of conveyance and the practical operation of the road, to put them in that condition and keep them so. This certainly is a wholesome rule, as well for the public as for the companies, for it is to their interest to have their road and appliances safe and in the best condition." But see Chicago & Alton R. Co. v. Kerr, 148 Ill. 605, where the court criticised the rule in the CONROY case, as applied to an employee, and overruled the same.

In a former decision of the Conroy case, namely, TOLEDO, PEORIA & WARSAW R'y Co. v. CONROY, 61 Ill. 162 (1871), fireman fatally injured by breaking down of bridge as engine was passing over same, judgment for plaintiff in the Circuit Court of Peoria county was *reversed* for erroneous instruction implying that railroad company is an absolute insurer of safety of roadbed. The rule is, that while a railroad is bound to use the highest degree of diligence in furnishing a safe roadbed, it is not an absolute insurer, and cannot be held liable for defect, of which such diligence would not inform it.

1. See also the following cases relating to injuries sustained by locomotive engineers:

In CLARK v. CHICAGO, BURLINGTON & QUINCY R. R. Co., 92 Ill. 43 (January Term, 1879), engineer injured in collision with train of another company using the same part of the road under a lease from his employer, judgment of Appellate Court of Third District, reversing judgment for plaintiff in the Circuit Court of Adams county, was *affirmed*. It was held that plaintiff assumed the ordinary hazards of employment and that it was "a matter of no consequence whether plaintiff was in a common employment with the servant of the lessee company whose negli-

gence or wilfulness caused the injury. Plaintiff was not injured by any cause outside of the ordinary perils of the service in which he was engaged. [Citing Indianapolis B. & W. R. Co. v. Flanigan, 77 Ill. 365; Chicago & N. W. R. Co. v. Ward, 61 Ill. 131.]

In CHICAGO & WESTERN INDIANA R. R. Co. and the BELT R'y Co. of CHICAGO v. FLYNN, 154 Ill. 448 (1895), engineer jumping from train to avoid accident owing to defective light at switch, and negligent act of a brakeman, judgment of the Appellate Court for the First District, affirming judgment for plaintiff for \$15,000 in the Circuit Court of Cook county, was *affirmed*. Affirming 54 Ill. App. 386.

FIREMAN KILLED BY PRECIPITATION OF LOCOMOTIVE INTO OPENING ACROSS TRACK — DUTIES AND LIABILITIES OF RAILROAD, AS TO SAFE STRUCTURES, ETC. — FELLOW-SERVANT — DAMAGES — ERRONEOUS INSTRUCTIONS. — In **CHICAGO & NORTHWESTERN R. R. CO. v. SWETT, ADM'R**, 45 Ill. 197 (*September Term, 1867*), fireman killed by locomotive and train being precipitated into a gulf or opening across the track, caused by alleged negligent construction of track, etc., and failure to keep same in repair, etc., judgment for plaintiff for \$3,400 in the Circuit Court of Whiteside county was reversed for erroneous instructions on the question of damages.

The rulings by the court in the opinion of BREESE, Ch. J., and as shown in the syllabus to the official report, are as follows:

"A railroad company is bound to provide suitable and safe materials and structures in the construction of its road and appurtenances, and if, from a defective construction of its road and appurtenances, an injury happens to one of its servants, the company is liable for the injury sustained.

"The obligation to provide suitable materials for the safe construction and equipment of its road, cannot be avoided by the delegation of such powers to other persons. The undertaking with its servants is direct, that it will properly and safely construct its road.

"A railroad company is responsible, under the same circumstances, for the same degree of care on the part of its agents as a master for his servant having direction of his carriage on the highway.

"It is the first duty of a railroad company to so construct its road, with all its necessary appurtenances, that its business may be transacted safely. It must use reasonable care in the selection of its rolling stock, and employ competent persons in the management of its business, that no unnecessary risk shall be incurred by any of its servants by reason of unsafe conduct of its trains or want of watchfulness over those in its employment.

"The doctrine that an action will not lie by a servant against his principal, for an injury sustained through the default of a fellow-servant, applies only to cases where the injury complained of occurs without the fault of the principal, either in the act which *caused* the injury or the *employment* of the person who caused it. [Keegan *v.* Western R. R. Co., 4 Seld. (N. Y.) 175.]

"An employee of a railroad company, assisting in the running of its trains, is not required to know whether the road has been safely and properly constructed. That it has been, is the implied undertaking of the company with its servants, and they enter its service in that faith and that it will be kept in safe repair.

"In an action against a railroad company for the killing of a fireman engaged in the line of his duty, the declaration alleged that the death was occasioned by reason of the original defective construction of a certain culvert on the line of its road, whereby the train was thrown from the track and its servant killed. The defendant demurred. *Held*, that the declaration was good; that the cause of the injury was the act of the company, for which it was liable for the damages sustained.

"An instruction to the jury upon an inquest of damages to the effect that in determining the amount of damages, they must exercise their own judgment from the facts proved, and from their own experience with mankind, is erroneous. The question must be determined upon the evidence alone.

"So, also, is an instruction by which the jury are told that, in estimating the damages, they are not to be limited to the actual present loss that may have been proved, but may also compensate for the relative injury with reference to the future, and may compensate for pecuniary injuries present and prospective. A limit should have been fixed within which the jury should be confined.

"The rule laid down by this court in the case of *Chicago & Alton R. Co. v. Shannon*, 43 Ill. 338, is the proper one, in cases where the death of a person is caused by the wrongful act, default, or negligence of another (1).

"The case of *Chicago & Alton R. Co. v. Shannon*, 43 Ill. 338; *Chicago & Rock Island R. Co. v. Morris*, 26 Ill. 400, and *City of Chicago v. Major*, 18 Ill. 360, cited and approved (2).

1. The court said, on this point: "The rule laid down by this court in the case of *Chicago & Alton R. Co. v. Shannon*, 43 Ill. 338, is the proper rule in such cases as this. We there said, if the next of kin are collateral kindred of the deceased, and have not been receiving from him pecuniary assistance, and are not in a situation to require it, only nominal damages can be given, no matter how near such collateral relationship may be. If, on the other hand, the next of kin have been dependent on the deceased in whole or in part for their support, no matter how remote the relationship, there has been a pecuniary loss, for which damages must be given. So, also, if the deceased was a minor and leaves parents entitled by law to his services. We further held, that while compensation for pecuniary loss was thus the basis of the action, the exact amount must necessarily be largely left to the jury, to be controlled by the sound discretion of the court, since it is impossible to determine with any certainty the pecuniary value of a life to those who have been dependent on the deceased when living. But, nevertheless, the pecuniary loss, taking into view all the circumstances, must be kept in view as the only proper basis of the verdict."
2. On this point the court said: "In the cases of *Chicago & R. I. R. Co. v. Morris*, 26 Ill. 400, and *City of Chicago v. Major*, 18 Ill. 360, it was held that the measure of damages which the next of kin of the deceased has sustained by

"In such case, it is error for the court to instruct the jury, concerning the *disposition manifested* by the deceased, to contribute to the support of his parent. The sole questions are: Did the deceased maintain her? Was he bound to do so? And in this respect what loss has she suffered?

"In an action against a railroad company for an injury sustained by one of its servants, occasioned by the defective construction of its road, the fact of negligence on the part of a fellow-servant of the person injured, cannot be shown.

"An instruction to the effect that if the jury find that the next of kin of the deceased were not dependent upon him for support, in whole or in part, then only nominal damages can be given, is correct, on the authority of the case of *Chicago & Rock Island R. Co. v. Morris*, 26 Ill. 400."

**FIREMAN THROWN FROM LOCOMOTIVE — DEFECTIVE TRACK — DUTY OF RAILROAD COMPANY TO FURNISH SAFE MATERIALS — RULE IN CONROY CASE OVERRULLED.** — In *CHICAGO & ALTON R. R. CO. v. KERR*, 148 Ill. 605 (*January, 1894*), fireman in defendant company's employ thrown from locomotive while passing over defective track, judgment of the Appellate Court for the Third District, affirming judgment for \$3,250 for plaintiff, in the Circuit Court of McLean county, was affirmed (1). Mr. Justice Wilkin, in the course of his opinion, said:

the death, is to be determined from the pecuniary loss they have sustained — that nothing is to be allowed by way of *solatium*."

1. See also the following cases relating to injuries to locomotive firemen:

*Defective cowcatcher or pilot.* — In *INDIANAPOLIS & ST. LOUIS R. R. CO. v. ESTES*, 96 Ill. 471 (1880), fireman on defendant's locomotive injured by a defective pilot or cowcatcher, judgment of Appellate Court for the Fourth District, affirming judgment for plaintiff in the Circuit Court of St. Clair county for \$3,000, was affirmed. Rehearing denied.

*Fireman killed — Derailment — Action against receiver — Practice.* — In *BROWN, ADM'R v. WABASH R'Y CO.*, 96 Ill. 297 (1880), it was held that "a court of equity has no jurisdiction of a suit in-

volving a question of unliquidated damages arising from a tort. It will not entertain a bill filed to recover damages for the death of a person through negligence of a railroad company, although the road at the time of the injury was in the hands of a receiver, and under his entire control, and he has conveyed the road to purchasers subject to all liabilities incurred by the receiver in operating the road." It seems that if a receiver is liable for a personal injury arising from the negligent management of the road, the party injured, or his representative, must first sue at law and settle the question of the receiver's liability, and the amount of damages, and then file a bill in equity against the grantee company. So stated in the syllabus to the official report. Fireman, in employ of the receiver of the railroad, killed

"The only ground of reversal urged in this court is the giving of the following instruction on behalf of plaintiff below:

"'3. The jury are instructed, as a matter of law, that a railway company owes the duty to its employees to do all that human care, vigilance and foresight can do, consistently with the practical operation of its road, in providing a safe road, roadbed, track, ties and rail, and to keep the same in repair; and if you believe, from the evidence, that the plaintiff while exercising reasonable care in the performance of his duty for the defendant, and without any notice of any defects, received an injury resulting from the negligence of the defendant in either of the above particulars, you will find for the plaintiff and assess his damages, providing you also believe, from the evidence, that the conductor in charge of the train upon which the plaintiff was performing his duty, received no notice of any defects before the happening of the injury.'

"This instruction was evidently written without proper regard to the different degrees of care imposed by the law upon railroad companies as to employees and passengers. As to the former the general rule is, it must exercise all reasonable care and diligence to place its roadbed, track and structures in a safe condition, and keep them so; while as to the latter it is held to the highest degree of care in that regard. *1 Shearm. & Redf. Negl.*, § 189. It is true, language used in some of the opinions of this court seems to ignore this distinction, particularly in the case of *Toledo, Peoria & Warsaw R'y Co. v. Conroy*, 68 Ill. 560 (1). That was an action to recover for the death of an engineer, alleged to have resulted from a defective bridge, and *BREESKE*, Ch. J., referring to prior decisions of the court, said: 'The result of which ruling is, not to hold these companies as insurers that their road and appurtenances and instrumentalities are safe and in good condition, but they must do all that human care and vigilance and foresight can reasonably do, consistent with the modes of conveyance and the practical operation of the road, to put them in that condition and keep them so.' This instruction does not, however, conform even to that language, but says, unqualifiedly, that the company owes the duty to its employees to do all that human care, vigilance and foresight can do, consistently with the practical operation of its road, in providing, etc., omitting the word '*reasonably*,' used above. \* \* \*

"We think, however, the language above quoted from the *Conroy* case, was inadvertently used, as applied to the case of an employee,

in derailment of train, caused by alleged negligence of receiver in failing *ante*.  
to keep fence in repair.

i. See the *CONROY* case, page 356.

and should be overruled. \* \* \* It was said in *Chicago, R. I. & P. R. Co. v. Lonergan*, 118 Ill. 48 (1): 'It is also a well-settled proposition in this and the courts of other States, that a railroad company is not bound to furnish absolutely safe machinery for its employees. The law imposes upon the company the obligation to use reasonable and ordinary care and diligence in providing suitable and safe machinery, tracks and switches, engines, etc., for the use of those engaged in its service.' Keeping in mind that in determining what is reasonable care in a given case, the nature of the employment, the machinery and appliances used, and the danger to which the employee is exposed, are always to be considered, the rule thus announced is a just one, and easy of application. We are, therefore, of the opinion that the giving of said instruction was error." \* \* \* [It was held, however, after discussion of the facts, that such error did not work a reversal of the judgment below.]

## CHICAGO AND NORTHWESTERN RAILROAD COMPANY v. MORANDA, ADM'X.

*Supreme Court, Illinois, September Term, 1879.*

[Reported in 93 Ill. 302.]

**FOREMAN OF TRACK REPAIRERS STRUCK BY PIECE OF COAL THROWN FROM ENGINE — DEATH STATUTE — DAMAGES — EVIDENCE — ERROR.** — In an action under the statute, by the administratrix of the estate of a deceased person to recover damages for the death of plaintiff's husband, who was the foreman of a party of track repairers in the employ of defendant railway company, caused by being struck by a large lump of coal carelessly cast by the fireman from the tender to the locomotive of a train which rapidly passed the gang of laborers while at work on the track, it was error to admit evidence that plaintiff and the next of kin had no other means of support than that furnished by the earnings of deceased, the damages in such case being limited to compensation for pecuniary loss suffered by the widow and next of kin, and for such error judgment for plaintiff was reversed (2).

1. In *CHICAGO, ROCK ISLAND & PACIFIC R. R. Co. v. LONERGAN*, 118 Ill. 41 (1886), brakeman coupling cars caught in defective appliance on track and run over by a car which crushed his arm, judgment of the Appellate Court for the Second District, affirming judgment for plaintiff in the Circuit Court of Peoria county, was reversed for misleading instructions as to character of appliances required, etc.
2. On a subsequent trial in the Circuit Court of Cook county plaintiff recovered judgment which was affirmed by the Appellate Court for the First District, but on appeal to the Supreme Court judgment was reversed for erroneous instruction on the fellow-servant rule and admission of certain evidence. See *CHICAGO & N. W. R'Y Co. v. MORNDA, ADM'X*, 108 Ill. 576 (1884).

**FELLOW-SERVANTS — FORMER DECISIONS — RULE DISAPPROVED.**

— In *Chicago & Alton R. R. Co. v. Murphy*, 53 Ill. 336, it is said: "When the ordinary duties and occupations of the servants of a common master are such that one is necessarily exposed to hazard by the carelessness of another, they must be \* \* \* regarded as fellow-servants," within the meaning of the rule exempting the master from liability in cases of this character; and this language seems to have been referred to with approbation in *Valtez v. Ohio & Mississippi R'y Co.*, 85 Ill. 500; but the same is here regarded as laying down the rule as to fellow-servants too broadly and is disapproved.

**FELLOW-SERVANTS — *RESPONDEAT SUPERIOR* — LIABILITY OF MASTER.** — A master is not liable to a servant injured through the negligence of a fellow-servant, but if such servants do not come under the relation of fellow-servants within the rule *respondeat superior*, the master is liable.**FELLOW-SERVANTS — WHAT MUST BE SHOWN UNDER THE RULE.**

— To constitute servants of the common master, "fellow-servants" within the rule *respondeat superior*, it must be shown that they were either strictly co-operating in the particular work at the time of the injury, or were usually consociated in their ordinary duties (1).

***RESPONDEAT SUPERIOR* — FELLOW-SERVANT — DISCUSSION OF RULE.** — An exhaustive discussion of the rule *respondeat superior*, and the doctrine of fellow-servant, appears in the opinion, with citation of numerous authorities.**TRACK REPAIRER AND FIREMAN NOT FELLOW-SERVANTS.** — Where a track repairer was struck and fatally injured by a piece of coal carelessly thrown by the fireman of a locomotive from a passing train, the railway company was liable in damages to his personal representative; and in such case the track repairer and the fireman, both in the employ of the same master, were not fellow-servants within the rule discussed (2).

1. On a subsequent appeal in the *MORANDA* case, 108 Ill. 576, judgment for plaintiff was reversed for erroneous instruction that the plaintiff's intestate, a track repairer, and the fireman of a locomotive, were not fellow-servants within the rule exempting the common master from liability, it being held a question of fact for the jury to determine from the evidence. The Supreme Court said: "In the former opinion in this case we held that in order to constitute servants of the same master 'fellow-servants,' within the rule *respondeat superior*, it is not enough they are engaged in doing parts of some work, or in the promotion of some enterprise carried on by the master, not requiring co-operation nor bringing the servants together or into such personal relations that they can exercise an influence upon each other promotive of proper caution in respect to their mutual safety, but it is essential that they shall be, at the time of the injury, directly cooperating with each other in the particular business in hand, or that their usual duties shall bring them into habitual consociation, so that they may exercise an influence upon each other promotive of proper caution," and the court adhered to that ruling.
2. On this point, however, the Supreme Court in a subsequent decision, in the *MORANDA* case, 108 Ill. 576, referring to the former decision (the case at bar) said: "Although, as the law

APPEAL from judgment for plaintiff for \$4,000 in the Circuit Court of Lee county. The case is stated in the opinion. *Judgment reversed.*

B. C. COOK, for appellant.

A. K. TRUSDELL and J. D. CRABTREE, for appellee.

**Dickey, J.**—John Moranda was the foreman of a party of track repairers, whose duty it was to repair and keep in order a section of the railroad track of appellant, and to be upon the track and see that it was kept in order for the running of trains. The hypothesis on which it is sought to sustain the recovery in the Circuit Court in this case is, that while Moranda was so engaged in this duty an express train passed by at the rate of some thirty to thirty-five miles an hour; that on the approach of the train to the place where Moranda and his party were at work on the track they stepped aside to avoid the passing train, he standing some five or six feet from the nearest rail of the track; and that as the train passed, a large lump of coal was carelessly cast by the fireman from the tender attached to the locomotive, which struck Moranda and caused his death.

This is an action, under the statute, by the administratrix of the estate of deceased. Appellant pleaded not guilty. A trial by jury resulted in a verdict of guilty, and an assessment of plaintiff's damages at the sum of \$4,000, and after overruling a motion for a new trial, the court rendered judgment upon the verdict.

then was, we reviewed questions of fact as well as of law, this left no question of fact to be passed upon, and it was not intended to then express any opinion that might prejudice a future trial upon any question of fact involved in the case; but in answer to a point made by counsel for appellant, and to eliminate from previous decisions a rule of law for future guidance, we assumed, as a hypothesis sustained by the evidence in the record, that at the time of the alleged injury the intestate, as section foreman of a gang of track repairers, and the engineer and fireman on an engine drawing one of appellant's trains, were not directly co-operating with each other in their respective labors, and that their usual duties did

not bring them into habitual consociation, so that they might exercise an influence upon each other promotive of proper caution. As a hypothesis presenting the question discussed, the particulars were as well assumed as if actually true — for the governing rule, not the sufficiency of the proofs, was the thing to be determined. But it was not intended to be asserted, and obviously it could not be asserted, as a universal truth, for numerous cases may be readily conceived in which there would be either direct co-operation or habitual consociation between and with such servants in a single, continuous work or enterprise, and, as a particular truth, it would be a subject of inquiry upon each trial."

On the trial the plaintiff, who is the widow of deceased, was permitted to prove that after the time of the death of Moranda she and her children had no other means of support, save that arising from his daily earnings. The utmost that can lawfully be recovered, in actions of this kind, is compensation for pecuniary loss suffered by the widow and next of kin. It was entirely proper to show the amount of his usual earnings, and that plaintiff was his wife in life, and that they had minor children whom he was by law bound to support, and who usually shared his income; but it was wholly immaterial whether such next of kin had or had not other pecuniary resources after his death. Such evidence was held incompetent in *City of Chicago v. O'Brennan*, 65 Ill. 160, and in *Pitts., Ft. W. & C. R'y Co. v. Powers*, 74 Ill. 343 (1).

Where the next of kin consists of collaterals, or persons whom the deceased in life was not bound by law to support, unless in a state of dependence, it may be proper to show that in his life they were supported by him. The question is, in such case, what pecuniary loss has been suffered by the next of kin. Their poverty after the death can shed no light on this question. If immediately after this disaster the plaintiff and her children had, by inheritance from other sources, become at once wealthy, it would not have abated one cent from the amount of their lawful demand in this case (if entitled to recover at all); nor can their poverty be permitted to add thereto.

For this error the judgment in the case must be reversed, and the cause remanded for a new trial.

There is, however, another question raised by counsel for appellant which will necessarily arise upon another trial, and ought therefore to be decided now.

It is insisted that "the plaintiff's intestate and the persons running the locomotive bore such relation to each other in the service of appellant, that one could not recover of the common

1. In *PITTSBURG, FORT WAYNE & CHICAGO R'Y CO. v. POWERS*, 74 Ill. 341 (1874), railroad employee engaged in ditching the track in defendant's yard struck by engine which was run upon him without signal or warning, judgment for plaintiff in the Superior Court of Cook county for \$3,500 was reversed for erroneous admission of evidence on the question of damages as to plaintiff having a family to support, as the evidence must be confined to plaintiff's injuries, capacity for business and probabilities of recovery from injuries. (Citing *City of Chicago v. O'Brennan*, 65 Ill. 160.) There were also errors in certain instructions.

employer damages caused by the negligence or carelessness of the other."

We think this position is not tenable. In *Chicago & N. W. R. R. Co. v. Swett*, 45 Ill. 197, 14 Am. Neg. Cas. 358, *ante*, a case in which the fireman was killed by reason of the negligence of the track repairers, it was held that the doctrine in relation to fellow-servants did not forbid the action.

In *Chicago, B. & Q. R. R. Co. v. Gregory*, 58 Ill. 272, the right of action was sustained where a fireman on a passing train was killed by a "mail catcher" improvidently placed too near the track by other servants of the railroad company. In that case it was said the agents charged with the duty of properly locating the "mail catcher" had no possible connection with the running of the trains, in which service the fireman was engaged, and it was added: "The duties were as different and as distinct as those of a conductor and of a track repairer."

In *Toledo, W. & W. R'y Co. v. O'Connor*, 77 Ill. 391, 11 Am. Neg. Cas. 430, the plaintiff's intestate was, as in this case, a track repairer, and the injury was caused by the negligence of another servant of appellant, engaged at the time in running a train upon the track. There, the fault was that of another servant of the company — the engineer on the passing train. Here, the alleged fault was that of the fireman. It is not perceived how this case differs from that in principle. It was there held that the track repairer and the engineer of a passing train were not fellow-servants, engaged in a common service, so as to exempt the employer from liability for the injury of the one by the neglect of the other (1).

Unless we are to overrule these, and other decisions of this court, we cannot sustain the appellant in the proposition that this action is barred by the relation of these servants as fellow-servants.

Counsel for appellant presses upon our attention what was said by this court in the case of *Chicago & Alton R. R. Co. v. Murphy*, 53 Ill. 336, 14 Am. Neg. Cas. 345, *ante*. In that case the servant injured was one of a party of laborers at a station, whose ordinary duties were to examine arriving trains, and take

1. The facts in the *Gregory* case, 58 Ill. 272, and the *O'Connor* case, 77 Ill. 391, are sufficiently stated in the case at bar and repetition of the same is unnecessary herein. Judgments for plaintiff's in the *Gregory* and *O'Connor* cases were affirmed.

out for repairs any cars in the train needing the same. The injury was caused by the negligence of the engineer operating the switch engine used at the station for that purpose. This court, upon the facts of that case, held that the servant injured and the offending engineer "were strictly fellow-servants of a common master, \* \* \* engaged in the same general department, to-wit, the doing of the needed work upon the depot grounds for the purpose of dispatching the various trains." And it was there said: "Under these circumstances we are wholly unable to hold \* \* \* that deceased and the engineer were not fellow-servants in such a sense as to subject them to the well established rule exempting the common master from liability in cases of this character."

After having thus pronounced the judgment of the court upon the question arising upon the facts of the case, the learned justice who delivered the opinion of the court proceeds to comment upon an instruction which the Circuit Court had refused to give to the jury, and says, in that connection: "When the ordinary duties and occupations of the servants of a common master are such that one is necessarily exposed to hazard by the carelessness of another, they must be \* \* \* regarded as fellow-servants, within the meaning of this rule."

Counsel for appellant, seizing upon this statement, insists that the judgment in the case at bar must be reversed on that ground, or the rule indicated in the Murphy case in 53 Ill. 336, *supra*, must be expressly overruled.

The decision of that case was undoubtedly correct, and does not, in any degree, militate against the views we have of this case; but the language of the opinion used in commenting upon the instruction in question in that case, was plainly too broad, and cannot be sustained without overruling the decisions of this court in very many cases. In fact, in that very opinion it is said: "It is, of course, not easy to define who are to be considered fellow-servants with such accuracy that doubtful cases will not occur." As applied to the facts of that case, the instruction in the Murphy case, 53 Ill. 336, *supra*, could lead to no false conclusion, but as a definition of what shall constitute fellow-servants in this class of cases, the language is plainly faulty.

If the law of this State be properly stated in that instruction, then, indeed, no action will lie for an injury in any case where the servant injured and the servant at fault were, at the time of

the injury, each engaged in the ordinary duties of his service, no matter how widely removed may be their employments from each other. It is plain that if the injury did actually occur to one while in his ordinary employment, and from the negligence of the other while he was in his ordinary employment, the negligent conduct of the latter must necessarily have endangered the safety of the former. If the law be properly stated in that instruction, we ought to overrule the decisions of this court in *Chicago & Alton R. R. Co. v. Shannon*, 43 Ill. 338 (1), and in *Chicago & N. W. R'y Co. v. Swett*, 45 Ill. 197, *supra*, and in *Ill. Cent. R. Co. v. Welch*, 52 Ill. 183, *supra*, and in *Ryan v. Chicago & N. W. R. Co.*, 60 Ill. 117 (2), and in *Toledo, W. & W. R. Co. v. O'Connor*, 77 Ill. 391, *supra*, and in other like cases. In all these cases both the plaintiff and the man by whose negligence the injury was caused, at the time of the injury "were in the employment of the defendant, and their ordinary occupations in such service bore such relation to each other that the careless and negligent conduct of the servant at fault endangered the safety of the plaintiff." Otherwise he could not have been, in such case, injured in fact, and yet in all these cases it was held the action would lie. We are not prepared to overrule these decisions or depart from their teachings, and are, therefore, upon mature consideration, compelled to disapprove of what was said in the Murphy case about the instruction discussed in that opinion, although it seems afterwards to have been referred to with approbation in the case of *Valtez v. Ohio & Miss. R'y Co.*, 85 Ill. 500, 14 Am. Neg. Cas. 343, *ante*.

What we have said is enough to dispose of this case, but the able, earnest and elaborate argument of counsel for the appellant seems to call for some further discussion. Recognizing that his

1. In *CHICAGO & ALTON R. R. Co. v. SHANNON*. ADM'R, 43 Ill. 339 (1867). brakeman killed by explosion of boiler of locomotive. judgment for plaintiff in the Circuit Court of McLean county was affirmed.

2. In *RYAN v. CHICAGO & NORTH-WESTERN R'Y Co.*, 60 Ill. 117 (1871). laborer in railroad's carpenter shop, in going from the shop to his home after day's work was done, struck by one of defendant's engines while crossing the

track. judgment for defendant in the Superior Court of Cook county was reversed for erroneous instruction as to fellow-servant. It was held that the employment of the engine driver, and plaintiff as a laborer in the carpenter shop, is so dissimilar and separate from each other, that plaintiff should not be held responsible for the negligence of the engineer; in such a case the railroad company should be held liable for gross negligence of the servant who caused the injury.

position is not in accord with the decisions of this court in the cases referred to, *supra*, wherein the common master has been held liable for damage done to one employee, by the negligence of another engaged in the same general enterprise, counsel for appellant presses upon our attention arguments and expressions of opinion found in our own reports in other cases where the master has been held exempt, which may seem incompatible with the rulings in the cases where the master has been held liable; and he supports his position by quotations from cases in English and American courts, which are certainly directly in point.

The decisions of courts of other States and the modern decisions of the English courts, though entitled to great consideration, are not binding authority in this State, and should have force here only in so far as the reasons upon which they rest may be found cogent and sound. And arguments and expressions of opinion found in our own reports, where they conflict with the decisions of this court, must always yield to the decisions.

It is no doubt true that many expressions found in the various opinions on this subject in our own reports, if read without reference to the facts under discussion, seem to be incapable of being reconciled; but it is equally true that a careful examination of the facts of the several cases in our reports, and an examination of the judgments pronounced in these same cases, will show remarkable harmony and uniformity in the *decisions*. Many of these decisions are not in harmony with the modern decisions in England, nor with the rulings in most of the States in this country; but it is believed they are founded in reason and are in harmony with each other.

Redfield, in his work on the Law of Railways, vol. 1, §131, says: "It seems now perfectly well settled in England, and mostly in this country, that a servant who is injured by the negligence or misconduct of his fellow-servant, can maintain no action against the master for such injury." This is undoubtedly true, but the courts do not all agree as to what is necessary to render employees of the same master "fellow-servants" within the meaning of this rule. The same author lays down what may be called the English doctrine on this question to be, that "all the servants of the same master engaged in carrying forward the common enterprise, although in different departments, widely separated, or strictly subordinated to others, are to be regarded

as fellow-servants, bound by the terms of their employment to run the hazard of any negligence of any of the number, so far as it operates to their detriment." In other words, where the general object to be accomplished by the service of each is one and the same, the employer the same, the several servants deriving authority and compensation from the same source, all employees and agents, from the highest to the lowest, are regarded by the English law as fellow-servants, no matter how remote from each other they may usually be occupied, or how distinct in character and nature may be their respective duties and employments. It is also true that this is the rule approved by the courts of last resort in most of the States in this country. We speak of this for convenience as the English rule, but in truth, its boundaries, as stated by Redfield, were first defined, in substance, by Ch. J. Shaw, in the case of *Farwell v. Boston & Worcester R. R. Co.*, 4 Metc., (Mass.) 49. And that case has very generally, and not improperly, been regarded, both in England and America, as the leading case in support of what we call the English rule. In this State this doctrine of exemption of the master has never been carried so far.

In several of the States this rule is subjected to limitations and is not carried to so great an extent. In this court, and in the courts of last resort in other States, the master has been held liable where the servant injured was in a subordinate position and the offending servant stood to the other as the representative of the master, and in other cases where the servants in question had no connection with each other in their service other than that of having a common master and of being engaged in a common enterprise.

The courts which maintain the English rule are not harmonious in their reasons for its support, and the courts wherein the rule is qualified by limitations do not agree, in all respects, as to the limitations to be placed upon the rule, nor do they agree entirely as to principles on which the rule is founded or by which the limitation should be controlled.

The exemption of the master from liability, in case of an injury of one of his servants by the neglect of another, is a rule comparatively new. Our attention has not been called to any mention of such a rule, or any allusion to it made in any reported case or by any law writer, until it was asserted in the case of *Priestley v. Fowler*, 3 Mees. & Welsb. 1, which arose in the Court

of Exchequer, in the year 1837 (1). It was there said that no precedent could be found for an action by a servant against his master for damages caused by the neglect of his fellow-servant. In the 7th edition of Story on Agency, § 153d, it is said that this question "has not until recently become a subject of judicial examination." The history of this doctrine is given in that work, in that and other sections immediately succeeding that, and in the copious notes thereto found in that edition.

The rule of exemption of the master in such cases is very generally placed upon the ground of public policy, that is, upon what is thought best for the well being of society. In the very first case where the question arose, *Priestley v. Fowler*, *supra*, the decision is placed squarely on that ground. The second case on this subject, of which we have any account, is that of *Murray v. South Carolina R. R. Co.*, 1 McMullen, 385, decided in February, 1841. The case of *Priestley v. Fowler*, *supra*, evidently was then unknown to that court, for it is there said no precedent upon the subject can be found. The master was there held exempt from liability — by a divided court. The judges concurring in the judgment did not rest their judgment upon the

1. In *Priestley v. Fowler*, 3 Mees. & W. 1 (Exch., 1837), a declaration in case stated that the plaintiff was a servant of the defendant in his trade of a butcher; that the defendant had desired and directed the plaintiff, so being his servant, to go with and take certain goods of the defendant in a certain van of the defendant then used by him, and conducted by another of his servants, in carrying goods for hire upon a certain journey; that the plaintiff, in pursuance of such desire and direction, accordingly commenced and was proceeding, and being carried and conveyed by the said van, with the said goods; and it became the defendant's duty to use proper care that the van should be in a proper state of repair, and should not be overloaded, and that the plaintiff should be safely and securely carried thereby; nevertheless that the defendant did not use proper care that the van should not be overloaded, or that the plaintiff should be safely and securely carried; in conse-

quence of the neglect of which duties, the van gave way and broke down, and the plaintiff was thrown to the ground, and his thigh fractured. Held, on motion in arrest of judgment, after verdict for the plaintiff, first, that it was sufficiently to be collected from the declaration that the defendant directed the plaintiff to go in the van; but, secondly, that, even in that case, the action was not maintainable.

In *Priestley v. Fowler*, *supra*. Lord Abinger, C. B., in delivering the opinion, said: "It is admitted that there is no precedent for the present action by a servant against a master;" and then proceeded to discuss the extent to which the principle of liability of a master to his servant would go, were it applied to the present case. "The mere relation of the master and the servant never can imply an obligation on the part of the master to take more care of the servant than he may reasonably be expected to do of himself."

same ground. What seems the ablest argument in favor of the judgment in that case, was made by Blanding, J. He says: "No man shall be liable for another's act except he has commanded it or has agreed to be so liable, or where such liability has been imposed on him by law, from principles of policy or for the public security." p. 391. And again: "If this (the public security) will be best promoted by making each person engaged in running the train risk all the injuries he may receive, without resort to his employer, then he should be excluded from such resort."

In Cooley on Torts, 541, it is said, "the rule is one of general public policy;" and again, that "in many employments the public are compelled to rely upon the caution and diligence of servants as the chief protection against accidents which may prove disastrous to life or limb." This is the current of the authorities, and we think the true ground upon which the propriety of the exemption of the master in any such case can be sustained. The history of this doctrine of exemption of the master, as well as the best reasoning of the cases, shows that what we have spoken of as a *rule* (exempting the master in certain cases), is in fact but an *exception* or qualification of the ancient general rule of the common law, *respondeat superior*, which, prior to the case of *Priestley v. Fowler, supra*, was laid down without *qualification* by all courts and common law writers.

In Comyn's Digest (title "Master and Servant," K), it is said: "A master is liable for every act of his servant done by him in the course of his employment," (referring to 2 T. R. 154, where the rule is there stated in these very words).

In Viner's Abridgement ("Master and Servant," B. 9), it is said: "If my servant doth anything prejudicial to another, it shall bind me, \* \* \* being about my business." Thus the law was formulated by Ch. J. Holt in *Tuberville v. Stamp, Comb. R. 459*. In the syllabus of *McManus v. Cricket*, 1 East, 107, the law is formulated in the words: "A master is liable to answer for damage arising to *another* from the negligence or unskilfulness of his servant acting in his employment."

Blackstone, in his Commentaries, says: "If a servant by his negligence does damage to a stranger, the master shall be answerable for his neglect." 1 B. Com. 431. Paley, in his work on Agencies, published in 1811, says: "By the employment of an agent the employer becomes civilly responsible for

his care and diligence to those who make use of him in his business," Paley on Agency, 294. And again (295), "A master is responsible for the negligence of his servant in the prosecution of his service," and the language of Ch. J. Holt is quoted, where he says, "Where a trust is put in one person, and another, whose interest is entrusted to him, is damnified by the negligence of such as that person employs in the discharge of that trust, he shall answer for it to *the party damnified.*" 12 Mod. 490. Story, in the first edition of his work on Agency, published in 1839, says: "The master is always liable to *third persons* for \* \* \* negligence \* \* \* of his servants in *all cases* within the scope of his employment."

No limitation of this rule was ever anywhere suggested until this question arose of the liability of a master to his own servant for injury by the neglect of another.

In support of the English rule, it has since been suggested, inasmuch as Blackstone, in his statement of the rule *respondeat superior*, speaks only of "damage to a *stranger*," that the rule by its terms does not embrace the case of damage to a servant, or, as it is said in one case, "this presupposes that the parties stand to each other in the relation of strangers between whom there is no privity;" and then assuming that there is a privity of some sort between the injured servant and some one else in relation to the act causing the injury, it is insisted that the case of an injury of one servant by the fault of another in nowise comes within the meaning of the rule as formulated by Blackstone. (Farwell *v.* Boston & Worcester R. R. Co., 4 Metc. 49.) In view of the words of older authorities, *supra*, this reasoning seems artificial and unsatisfactory. It is hardly to be supposed that Blackstone intended, by the introduction of the word "stranger," to state or lay down a *limitation* upon the rule *respondeat superior*, as before that formulated in Comyn's Dig., 2 Term R. 154, Viner's Abr., 1 East, 107, or as expressed long before in Tuberville *v.* Stamp, Comb. R. 459, or to qualify the same in any way whatever. If Blackstone had attached to the word "stranger," as used in that sentence, any special significance, it seems he would have given some explanation as to whom we should in that connection regard as strangers — some commentary on the departure from the language of the fathers in the common law. It is not to be believed that Paley or Story, who formulated the rule after Blackstone's day, intended to state

the rule more broadly than was their understanding of the meaning Blackstone intended to convey by the words used by him. It seems almost certain that had Paley or Story understood Blackstone as stating the rule of *respondeat superior* in a more limited sense than that of the earlier authorities, neither of them would have used the broad language of the older authorities without some comment on the language of Blackstone, and without assigning some reason for differing from a writer of such great authority. It seems more reasonable to infer, as we do, that Blackstone used the word stranger in the broad sense—meaning the same as if he had said, "damage to another," instead of "damage to a stranger." Kent so understood — for when he wrote in 1827, he said of a master, "He is said to be liable, if the injury proceeds from the negligence or want of skill in the servant."

We are brought to the conclusion that the general rule of *respondeat superior*, in its application to all cases arising before 1837, was applicable to all third persons falling within the true reason of the rule, and that the doctrine of the exemption of the master, in case of an injury of one fellow-servant by the fault of another, is really an exception to the rule.

If this be so, to determine what cases fall within the rule, and what cases do not fall within the rule, it seems to be wise to consider carefully the reasons on which the rule itself rests, and then to place such cases, and such cases only, on the list of exceptions as are not within the reasons on which the rule is founded.

The common-law rule — whereby the master is made to answer for damage done to others by the neglect of his servant — is plainly unjust, when applied to a case where the master has with due care employed a competent and careful servant, and is himself guilty of no wrong. As a mere matter of strict justice a man who has himself done no wrong ought not, as a mere matter of justice, to be compelled to answer for the negligence of another.

The general rule, however, *respondeat superior*, although unjust as applied to the master in such cases as already shown, is as old as the common law, and is no doubt founded in wisdom. This rule, like many others, rests upon considerations of policy, upon the ground that the well-being of society is best promoted in that way. "In no other way could there be any safety to third

persons dealing with principals through agents." (Story on Agency, § 452.) Cooley says, "the well-being of society is best subserved thereby." Ch. J. Shaw says, the rule *respondeat superior* "is adopted from general considerations of policy as security." Farwell *v.* Boston & Worcester R. R. Co., 4 Metc. (Mass.) 49. And again, in the same case, "the rule is founded on the expediency of throwing the risk upon those who can best guard against it."

If this be so the liability of the master must turn upon the proper consideration, in each class of cases, of what ruling will in fact throw the risk upon those who can best guard against it, of what is demanded to promote in the highest degree the well-being of society. The best interests of society demand that all business should at all times be so conducted that the least possible harm shall be caused thereby; that all servants, and especially all servants controlling dangerous instrumentalities, shall constantly use due care. The position that the well-being of society in early days demanded in such cases the rule *respondeat superior*, was sustained upon the view then taken of the usual subordination of servants to the will of the master, and the usual devotion of the servant to the interests of the master. It seems to have been wisely thought that it would induce greater caution in servants to avoid injury to others, if servants knew that the master must answer for such injury; and also, that the responsibility of the master in such case would usually incite him to greater vigilance in promoting the desired constant caution in his servants. Where servants are habitually consociated in their daily duties (as most servants were at an earlier day in England), they may well be supposed to have an influence over each other, and a power to promote in each other caution, by their counsel, exhortation and example, at least equal to that of the master, and perhaps greater. In such case the well-being of society does not seem to demand that the master should be made to answer, in cases where he had done all that he ought to do, and the injury was to one such servant and from the negligence of another. The vigilance of such servants in such case may well be supposed to have a greater stimulant to constant exercise if each one knows that neither he nor his comrades can have any redress for injury to one by the negligence of the other. But where servants of a common master are not consociated in the discharge of their duties — where their employment does not require co-operation,

and does not bring them together, or into such relations that they can exercise an influence upon each other promotive of proper caution — in such case, the reason of the rule holding the master responsible for damages resulting from the negligence of one of his servants seems reasonably to apply with as great force as if a stranger were the party injured. The influence of one servant upon another in the encouragement of caution cannot be relied upon in such case, for that can only separate where they are co-operating, or are brought together by their usual duties, or where there is habitual consociation. Then, indeed, in cases where they cannot be supposed to have in their power in any way to promote caution in each other, the well-being of society, if it is to have any such security, must depend entirely upon the vigilance of the master in promoting constant caution in each of his servants, and upon the desire of servants to protect the master from liability. Hence the master must in such case be held responsible for the neglect of his servant.

The application of these views, it is believed, will render it entirely practicable to maintain the rule adopted by this court, recognizing a distinction between the case of co-servants, whose duties are entirely distinct from each other, and are not such as to imply consociation or co-operation, and the case of co-servants consociated by means of their daily duties, or co-operating in the same department of duty or the same line of employment.

The line of argument, briefly stated, is this: The ancient common-law rule which holds a master (even in cases where he is guilty of no fault) responsible for the neglect of his servant, where a third person suffers damage from the negligence of such servant, rests entirely upon considerations of its practical effect upon society — upon considerations of policy; and these considerations of policy rest upon the idea that the subordination of the servant to the will of the master and his devotion to the interests of the master give him, under that rule, incentives to caution he would not otherwise have, and upon the idea that the rule will incite the master to greater vigilance in the selection of prudent servants, and to greater zeal in the exercise of his influence over his servant to secure the exercise of care in all cases. When the reason of the rule ceases, the application of the rule ought also to cease, and especially is this true of a rule which rests not upon its own justice, but solely upon considerations of policy. Where servants of the same master are directly

co-operating with each other in a particular business at the time of the injury, or are, by their usual duties, brought into habitual consociation, it may well be supposed that they have the power of influencing each other to the exercise of constant caution in the master's work (by their example, advice and encouragement and by reporting delinquencies to the master) in as great, and in most cases in a greater, degree than the master. If, then, each such servant knows that neither he nor his fellow-servant, if injured by the other's negligence, can have redress against the master, he has such incentive to constant care, and such incentive to the exercise of his influence upon his fellow to incite him to constant care, that the well-being of society in such case does not demand that the master be made to answer. The same considerations of policy which, to avoid injuries to third persons, usually demand that the master be held responsible, seem plainly not to demand it in the case of such co-servants. But though servants are employed by the same master, and are engaged in doing parts of some great work carried on by the master, still, unless either their duties are such that they usually bring about personal association between such servants, or unless they are actually co-operating at the time of the injury in the business in hand, or in the same line of employment, they have generally no power to incite each other to caution by counsel, exhortation or example, or by reporting delinquencies to the master, and the well-being of society in such case must depend upon the devotion of the servant to the interests of the master, and the zeal of the master to promote a constant exercise of due care by his servant; and to bring these instrumentalities into action it becomes necessary (as in the case of an injury to a stranger) to adhere to the general rule that the master must answer for the neglect of his servant, and this, as already suggested, because the facts are such that society cannot, in such case, avail itself of the mutual power and influence of one servant upon another for want of the necessary opportunity for its exercise, and hence must depend for inducements to caution which are supposed to follow the general rule of the master's liability.

An examination of the decisions of this court upon this question will show that the judgments are all in full and strict accord with these views, and it is believed no case can be found in our own reports, where the common master has been held exempt from liability for injury to one servant by the neglect of another,

where it does not appear that the servants were either strictly co-operating in the particular work they were about, or were usually consociated in their ordinary duties.

The first case in this court where this question received consideration was that of *Honner v. Ill. Cent. R. R. Co.*, 15 Ill. 550 (1) The plaintiff was one of several servants of appellee engaged in adjusting a turn-table, when he was injured by the others so engaged with him. It was held he could not recover. Here, they were strictly co-operating in the particular work they were about.

In *Ill. Cent. R. R. Co. v. Cox*, 21 Ill. 23 (2), the servant injured was a laborer on a wood train, and the injury was the result of the negligence and want of vigilance on the part of the engineer and conductor running the train, and it was held no recovery could be had. Here, they were consociated in their ordinary duties. They usually worked together.

In *Chicago & Alton R. R. Co. v. Keefe*, 47 Ill. 108 (3), the plaintiff was a laborer on a construction train, and was injured by the neglect of the engineer and conductor operating the train. It was held the action would not lie. Here, they usually worked together.

In *Chicago & Alton R. Co. v. Murphy*, 53 Ill. 336, *supra*, the injury was to one of a "repair gang," working at a station or yard, and was caused by the negligence of the engineer of a switch engine which was constantly engaged at that yard, and by which cars were switched for repairs.

In *Gartland v. Toledo, W. & W. R'y Co.*, 67 Ill. 498 (4), the

1. The HONNER case, 15 Ill. 550, is appended as a note to *Ill. Cent. R. R. Co. v. Cox*, 21 Ill. 23, reported in this volume of AM. NEG. CAS., *post*.

2. The COX case, 21 Ill. 23, is reported in this volume of AM. NEG. CAS., *post*.

3. In CHICAGO & ALTON R. R. CO. v. KEEFE, 47 Ill. 108 (1868), judgment for plaintiff in the Circuit Court of Sangamon county was reversed it being held (as per syllabus to the official report) that: "Where a laborer upon a construction train, at work under the orders of the conductor in charge of such train, is injured in consequence of the moving of the train by the engineer, also in pursuance of the order of the conductor, but without giving the preliminary signal, as required by the rules, such laborer cannot recover against the common master for injuries resulting from the carelessness of his engineer, if the master had used due diligence in his selection."

4. In *Gartland v. Toledo, Wabash & Western R'y Co.*, 67 Ill. 498 (1873), minor employee engaged with other employees in operating heavy cars on

injury was caused by the negligence of servants engaged in moving cars, and was done to one of their number — strictly an associate.

In *St. Louis & S. E. R'y Co. v. Britz*, 72 Ill. 256 (1), a laborer on a construction train was injured by the negligence of the conductor and brakeman of the same train. And in *Col., Chic. & Ind. Cent. R. Co. v. Troesch*, 68 Ill. 545, 14 Am. Neg. Cas. 352, *ante*, a conductor at a yard, who directed and assisted in making up trains, claimed to have been injured by the fault of the switch engine-driver engaged in making up the same trains, and they were held fellow-servants.

In *Ill. Cent. R. Co. v. Keen*, 72 Ill. 512, 14 Am. Neg. Cas. 353, *ante*, the servant injured was a brakeman, and the fault was that of the engineer on the same train.

In *Toledo, W. & W. R'y Co. v. Durkin*, 76 Ill. 395 (2), a laborer, or shoveler, on a gravel train was injured by the neglect of the engineer on the same train.

In *Chicago & Alton R. Co. v. Rush*, 84 Ill. 570 (3), it was a brakeman, who was alleged to be injured by the default of the engineer operating the same train.

defendant's track, injured by being struck by one of the wheels of one of the cars whereby his right leg was broken and the other leg severely injured, judgment on demurrer to declaration was affirmed. "Where a minor, while in the service of a railway company, under an express contract, receives an injury through the negligence of a co-employee in the same line of duty, the company will not be liable to him for such injury. By entering into the employment he takes upon himself the natural and ordinary risks incident to the service in which he engaged, among which is the carelessness of his fellow-servants."

1. In *St. Louis & SOUTHEASTERN R'y Co. v. Britz*, 72 Ill. 256 (1874), judgment for plaintiff for \$250 in the Circuit Court of St. Clair county was reversed, it being held that a laborer on a construction train, injured in collision with a passenger train, and the engi-

neer and brakeman and conductor, were fellow-servants.

2. In *TOLEDO, WABASH & WESTERN R'y Co. v. DURKIN*, Adm'x, 76 Ill. 395 (1875), plaintiff's intestate, returning, with other employees, from work on a platform car, killed in collision of train with animals on track, judgment for plaintiff in the Circuit Court of Madison county for \$3,000 was reversed, on the ground that the injury was caused by the negligence of fellow-servants, a risk assumed by the deceased employee.

3. In *CHICAGO & ALTON R. R. Co. v. RUSH*, 84 Ill. 570 (1877), brakeman uncoupling cars, standing on flat car and thrown off same, and foot run over, judgment for plaintiff in the Circuit Court of Madison county was reversed, on the ground of contributory negligence.

And in *Valtez v. Ohio & M. R'y Co.*, 85 Ill. 500, 14 Am. Neg. Cas. 343, *ante*, a car-repairer, at a station or yard, was injured by the negligence of the engine-driver of the switch engine used at the same yard.

It is insisted, in substance, that the reasons assigned in the support of these decisions are such that they should govern in this case, and others in which this court has held the common employer liable.

Thus it was said, "There are certain perils incident to all employments, and which both parties have in view when the engagement is made," \* \* \* and "which the employer does not undertake to insure against" (*Ill. Cent. R. Co. v. Honner*, 15 Ill. 552); but in the same case it was said, "I would be far from saying that there may not be cases of carelessness \* \* \* on the part of those to whom the corporation may entrust the management of its concerns, producing injury to the employees of the company for which it would be liable."

And in *Ill. Cent. R. Co. v. Cox*, 21 Ill. 20, *supra*, it was said, "It is right and proper that one servant should not recover against the common master for the carelessness of his fellow-servant," etc.; but the reason assigned was, "it is important to all concerned that each servant should have an interest in seeing that all his co-servants do their duty;" and it is plain this reason can only apply in cases where the service of the one bears such relation to the other that such servants may have it in their power to exercise an influence to that end.

And in *Gartland v. Toledo, W. & W. R'y Co.*, 67 Ill. 498, *supra*, it was said, "by so entering into this employment" he "took upon himself the natural and ordinary risks and perils incident to the service in which he engaged, among which was the carelessness of his fellow-servants."

The same suggestion that the employee, by his contract of the services undertakes the hazard of the occasional negligence of fellow-servants who are generally careful, and that the employer does not warrant against such hazard, has been expressed in *Toledo, W. & W. R. Co. v. Durkin*, 76 Ill. 395, *supra*, and in *Valtez v. Ohio & M. R'y Co.*, 85 Ill. 500, *supra*, and perhaps in other cases. But it must be remembered that this contract thus spoken of is in no case supposed to be an express contract. It is an implied contract to which reference is made, and it must also be remembered that *implied promises* are mere fictions of the

law whereby one is supposed to undertake to perform the duties imposed upon him by law. In Kerr's Action at Law, 3d ed., by Smith, page 144, it is said, implied contracts arise "from this general implication and intendment of courts, that every man hath engaged to perform what his duty and justice require."

Chief Justice Shaw, in discussing the question whether the common master of fellow-servants rests upon any implied promise to protect one against the negligence of the other, says: "In considering rights and obligations arising out of particular relations, it is competent for courts of justice to regard considerations of policy and convenience, and to draw from them such rules as will, in their practical application, best promote the safety and security of all parties concerned. This is, in truth, *the basis* on which *implied promises are raised*, being *duties legally inferred* from a consideration of what is best adapted to promote the benefit of all persons concerned, under given circumstances."

When, therefore, it is said, in this connection, that a servant assumes, by entering the service of his master, any given hazard, it is merely another form of saying that, under all circumstances, the law imposes that hazard upon him. Remembering, then, that in this State it is held that the law does not impose upon the servant the risk as to the neglect of all the servants of his master engaged in the same general enterprise, but confines that risk to cases where he and the offending servant are, in a proper sense, *fellow*s, it will readily be perceived that these general words are to be understood as applying to the cases in which they are used — applying to cases where this court holds that the law does impose the hazard upon the servant. In other words, the servant, by engaging in the service, by an implied promise takes upon him all risks which the law imposes upon him, and no others; and these are not improperly called "ordinary risks," and embrace the exceptional negligence of careful servants who are his fellow-servants within the law of this State, but do not embrace the acts of negligence of other servants of the same master who are not properly his fellows, although engaged in parts of the same general enterprise of the common master.

Accordingly, this court has in many cases held the master liable to the servant for damages caused by the neglect of another servant, although both were doing service contributing to the accomplishment of the same general enterprise.

In Chicago & Alton R. R. Co. v. Shannon, 43 Ill. 338, *supra*,

the injury was to a brakeman, from the bursting of a boiler, and the fault was the negligence of the foreman at the round-house in sending out an unsafe engine. The master was held liable.

In *Chicago & N. W. R. R. Co. v. Swett*, 45 Ill. 197, 14 Am. Neg. Cas. 358, *ante*, the injury was to a fireman upon a locomotive, and was caused by the negligence of the track-repairers, in not keeping a bridge or culvert in proper repair; and the master was held responsible.

In *Schooner Norway v. Jensen*, 52 Ill. 373, 14 Am. Neg. Cas. 327, *ante*, the injury was to a sailor on the schooner, and was caused by the negligence of other servants of the same master, whose duty it was to see that the rigging and tackle of the vessel should not be sent out in bad order or in a defective condition. It was held the action would lie.

In the case of *Ill. Cent. R. R. Co. v. Welch*, 52 Ill. 183, *supra*, the injury was to a brakeman on a passing train, and was caused by the negligence of other servants of the company, in placing an awning at the station in dangerous proximity to the operatives on passing trains; and the action was sustained.

Where the injury was to a brakeman on a freight train, and was caused by the negligence of other servants of the same employer, having charge of the inspection and repair of cars, in permitting a car to go out on the road with a defective ladder, which defect was unknown to the brakeman, the common master was held liable. *Chicago & N. W. R. R. Co. v. Jackson*, 55 Ill. 492 (1).

Where the injury was to a fireman upon a passing train, and was caused by the negligence of the other servants not connected with the running of the train, in negligently placing a "mail-catcher" too near to the track, it was held, the action would lie against the common master. *Chicago, B. & Q. R. R. Co. v. Gregory*, 58 Ill. 272, *supra*.

Where the injury was to a common laborer in a carpenter shop of a railroad company, near the railroad track, and the injury was

1. In *CHICAGO & NORTHWESTERN R'Y Co. v. JACKSON*, 55 Ill. 492 (1870), brakeman on freight train falling from car while descending from ladder on same for the purpose of uncoupling it from the engine, a defective ladder being alleged, judgment for plaintiff in the Circuit Court of Kane county for \$18,000 was *reversed*, the damages being excessive, the injuries sustained resulting in amputation of plaintiff's legs. The ruling in the *Swett* case, 45 Ill. 197, as to duty of railroad companies to furnish safe materials, etc., applied and followed.

caused by the negligence of the engineer in charge of a passing train of the same company, the common master was held liable. *Ryan v. Chicago & N. W. R. R. Co.*, 60 Ill. 171, *supra*.

In the case of *Toledo, P. & W. R'y Co. v. Conroy*, 61 Ill. 162, 14 Am. Neg. Cas. 356, *ante*, although the action was defeated on another ground, the court indorse the proposition that, where the injury was to a fireman, from defects in a railroad bridge, unknown to him, and which ought to have been known to other servants of the same employer, and the injury came through the negligence of the latter, an action will lie; and in this same case it was afterwards so adjudged. 68 Ill. 560.

In *Chicago & N. W. R. R. Co. v. Taylor*, 69 Ill. 461 (1), where the injury was to a station agent and switchman at a way station, and was caused by the negligence of other servants of the company, whose duty it was to see that cars in passing trains should not go out upon the road without proper lights and proper brakes, the common master was held liable.

In *Ill. Cent. R. R. Co. v. Patterson*, 69 Ill. 650 (2), it is laid down that an action will lie where the injury was to an engineer of a passing train, and was caused by the negligence of other servants of the common master, whose duty it was to see that the railroad track was in good order, although that action was defeated by the negligence of the servant who suffered the injury.

Where the injury was to a switchman at a station, and resulted from the negligence in the car-inspectors in permitting a caboose

1. In *CHICAGO & NORTHWESTERN R'Y CO. v. TAYLOR ET AL.*, 69 Ill. 461 (1873), station agent and switchman, in discharge of his duty, attempting to get to the switch, on a dark night, struck by a car making a "flying switch," and killed, judgment for plaintiffs for \$5,000 in the Circuit Court of Winnebago county was *affirmed*. On rehearing the judgment was *affirmed*.

ground that his own conduct being reckless he could not hold the company responsible in damages for the injury.

See also subsequent decision in *ILLINOIS CENTRAL R. R. CO. v. PATTERSON*, 93 Ill. 290 (1879), engineer injured by reason of engine running off track, where judgment for plaintiff in the Circuit Court of Ogle county was *reversed* on the ground of contributory negligence in running the engine at a greater speed than the rules required over a part of the road known by him to be in bad condition. See also former appeal in the *PATTERSON* case, 69 Ill. 650, where judgment for plaintiff was reversed because the verdict was not sustained by the evidence.

2. In *ILLINOIS CENTRAL R. R. CO. v. PATTERSON*, 69 Ill. 650 (1873), engineer running train at greater speed than allowed injured by the train being thrown from the track, judgment for plaintiff for \$9,000 in the Circuit Court of Lee county was *reversed* on the

to go out on the road with a draw-bar which was too short, the common master was made to answer to the injured servant. Toledo, W. & W. R'y Co. v. Fredericks, 71 Ill. 294, 14 Am. Neg. Cas. 347, *ante*.

And where the servant injured was one of a party of track-repairers, whose ordinary duties were not at the station, and the injury occurred by reason of the negligence of an extra engineer, whose duty it was to take arriving engines to the round-house, and while the party injured was temporarily engaged, by the express orders of his foreman, in ditching the track at the station, this court said that the rule which forbids a recovery by a servant for an injury resulting from the negligence of a fellow-servant, did not apply. Pitts., Fort W. & C. R'y Co. v. Powers, 74 Ill. 341, *supra*.

Where a brakeman upon a freight train was injured through the negligence of other servants of the common master, whose duty it was to send out no cars save those which were safe, so far as could be ascertained, the common master was held liable. Toledo, W. & W. R'y Co. v. Ingraham, 77 Ill. 309 (1).

In the case of Toledo, Wabash & Western R'y Co. v. O'Connor, 77 Ill. 391, the servant injured was a laborer employed as a track-repairer, on a section away from the station, and, at the time of the injury, was coming from his work, with his associates, over the main track, on a hand car; and the injury was caused by the negligence of the engineer upon a passing locomotive, and this court held the common master liable.

So, where the injury was to an engineer by the explosion of his engine, it was held that the engineer cannot be regarded as a fellow-servant with the servants of the same master, whose duty was to inspect and keep in order its engines. Toledo, W. & W. R'y Co. v. Moore, 77 Ill. 217, 14 Am. Neg. Cas. 354, *ante*.

So, where the injury was to an engineer operating a train on the railroad, and was caused by the negligence of the train dispatcher, whose duty it was to regulate the movement of trains by telegraphic orders or otherwise, it was held that the common

1. In TOLEDO, WABASH & WESTERN sustained by the cars passing over R'y Co. v. INGRAHAM, 77 Ill. 309 (1875), plaintiff were: several broken ribs, injured foot, broken arm, abdomen infective ladder, judgment for plaintiff jured, and partial paralysis of lower in the Circuit Court of McLean county parts, rendering plaintiff a cripple for for \$5,000 was affirmed. The injuries life.

master was answerable. *Chicago, B. & Q. R. R. Co. v. McLallen*, 84 Ill. 109, 14 Am. Neg. Cas. 351, *ante*.

It will be seen, by the cases cited, that in all the cases wherein the right of action has been denied upon the ground that the injured servant and the offending servant were fellow-servants, the facts show that they were brought into personal consociation by their ordinary duties, or that at the time of the injury they were actually co-operating in some particular work. And it also appears that in the cases where the action has been sustained no such relations existed. In the latter cases, this court has said, they were not employed "in the same department of labor," and that one is "not in the same line of employment" with the other; and again, that they did not "co-operate in the performance of their duties." And in *C. B. & Q. R. Co. v. Gregory*, 58 Ill. 272, *supra*, it is said that "one servant can recover from a common master for the negligence of a fellow-servant, unless the latter is in the same line of employment." And again: "The agents charged with that duty" (the duty of properly locating the mail catcher), "had no possible connection with running the trains." \* \* \* "The duties were as different and as distinct as those of a conductor and those of a track-repairer." In another case, by way of showing that the relation of fellow-servants proper did not exist, it is said "neither could control the other or know of his want of prudence;" and again, they "are not associated in the performance of their duties." And in one case, *Ryan v. Chicago & N. W. R'y Co.*, 60 Ill. 171, *supra*, it is said that the reason for holding against a right of recovery in certain cases of co-servants, is, that for the safety of all each servant "in the same department of business, should be interested in securing a faithful and prudent discharge of duty by his fellow-servants;" and that each should be induced "to report to the master any delinquency of those engaged with him in the performance of duty." This reason, it is said, "cannot apply where one servant is employed in a separate and disconnected branch of the business from that of another servant;" and again it is said "the object of the rule of exemption of the master is to make each servant vigilant in seeing that the others are careful and faithful;" and it is added, "where the reason of the rule fails the application of the rule should cease."

Although the distinction taken by this court between these

two classes of co-servants has not the sanction of the courts of England, nor that of most of the courts of last resort in this country, we think on principle it is a distinction which ought to be taken, and which logically springs from the true reason (as already suggested) on which the common-law rule *respondeat superior*, rests — upon the expediency of throwing the risk upon those who can best guard against the dangers.

Had these considerations been constantly kept in view, in all cases of injury to one of his servants by the fault of another, it is believed the exemption of the master in such cases would have been kept within reasonable bounds. If courts had constantly had an eye to casting the hazard on those who have the best means of preventing wrong, it is thought the exemption would have been applied to cases where the co-servants occupy such positions in relation to each other as to suggest that they could, in some way, contribute towards guarding against the danger to be apprehended. This, however, being really a question as to what rule will best subserve the great interests of society, it is perhaps not surprising that courts of different States and different countries should have differed in their judgment as to what rule on this subject should govern.

The fact that no case can be found in the reports of judicial proceedings prior to 1837, in which the master was ever sued by his servant for damage done to him by the neglect of another of his servants, and the fact that the first case of the kind in England was decided against the action, and the fact that the first case of the kind in America (decided, evidently, before the report of the English case was known to the bar or bench in South Carolina) was also decided against the action (*Murray v. S. C. R. R. Co.*, 1 McMullen, S. C., 385), are very significant in showing that the action in cases of strictly fellow-servants ought not to be sustained. On the other hand, it is true that what is here denominated the English rule on this question, has, in all its progress in the courts of England and America, encountered constant resistance by the bar and many of our ablest jurists; and that the reasons assigned in its support by the courts adopting it have been deemed inadequate and illogical, and have not been found in harmony with each other. These facts are significant in suggesting that that rule has not generally been placed on its true foundation, and has generally been carried too far. Upon the whole, we see no sufficient reason to depart from the

rule indicated by the decisions in our own State, and cannot do so in this case.

The judgment in this case must be reversed, and the cause remanded for a new trial in consonance with the views herein expressed.

Judgment reversed.

Mr. Justice Sheldon dissented upon the second branch of the opinion.

**EMPLOYEE IN RAILROAD SHOPS ENGAGED IN PUSHING LUMBER CARS, UNDER DIRECTION OF FOREMAN, KILLED BY BEING CAUGHT BETWEEN CARS — FELLOW-SERVANT — RAILROAD COMPANY LIABLE.** — In **CHICAGO & ALTON R. R. CO. v. MAY**, ADM'X, 108 Ill. 288 (*January Term, 1884*), judgment for plaintiff for \$3,250 in the Circuit Court of McLean county, affirmed by the Appellate Court for the Third District, was *affirmed* (three justices dissenting). The facts, as stated in the opinion by Mulkey, J., were as follows: "The deceased [Christian May, plaintiff's husband] at the time of his death, was one of a number of hands in the employment of the railroad company in a lumber yard connected with its work shops, at Bloomington, under the immediate control and charge of one Frederick Fricke, who was also in the employ of the company, as foreman of the lumber yard (1). Immediately before the death of May, we find Fricke, together with a squad of these hands, including the deceased, engaged in removing a lot of lumber from the yard to the car shops. The lumber in question consisted of a pile of heavy oak plank, some sixteen feet long. For the purpose of removal it had already been placed upon a small, light car, some six or eight feet long, called a 'rubble car,' which was used in handling lumber in the yard and in removing it to the shops. The lumber, as well as the car, was at the time sheeted with ice and snow. The car thus loaded stood on the track north of the shops, and immediately south of it, on the same track, stood a large box car which had to be got out of the way before the lumber could be run down into the shops. To get this car out of the way it was necessary that both cars should be pushed some distance north, beyond

1. See also the following case: In **ILLINOIS CENTRAL R. R. Co. v. GILBERT**, ADM'R, 157 Ill. 354 (1895), minor employee in machine shop engaged in pushing cars to shop struck and killed by a passing train, judgment of the Appellate Court for the First District, affirming judgment for plaintiff in the Superior Court of Cook county for \$2,500 was *affirmed*. Affirming 51 Ill. App. 404.

a switch, so the box car could be switched off to one side, and by that means let the rubble car, so loaded, pass back south into the shops. To accomplish this object Fricke ordered the men to push the box car against the rubble car, which shoved the lumber so far over on the north end of it that the small car, thus loaded, would have tipped up and thrown the lumber out, but for the fact the bumper of the box car held it down. The two cars were pushed in this manner till they passed the switch, when Fricke ordered the men to leave the small car where it was, and push the large one south, out of the way. Two of the men, Grenz and Schmekel, went to the north end of the planks, as they lay projected on the rubble car, and held them up, while the other hands commenced pushing the large car, as directed by Fricke, and as soon as the cars were sufficiently separated, some of the men, including May, went in between the two cars, to enable them to push with more effect. While matters were in this situation, Fricke called Grenz and Schmekel to also come and help push the large car, whereupon they told him the plank would fall and some one would get hurt. Notwithstanding this admonition and warning, Fricke repeated his order with emphasis, saying, 'Let the lumber go to the devil.' The order was obeyed, and instantly the north end of the lumber fell to the ground, tilting up the south end of the little car and driving it forward with great force against the end of the car being thus shoved. The action of the car was so instantaneous the parties pushing at the end of the box car had no time to escape, and the deceased was caught between the bumper of the large car and the rubble car, thereby inflicting injuries from which he subsequently died." \* \* \* The question of fellow-servant was fully discussed both in the affirming and dissenting opinions, and it was held that the foreman of the lumber yard was not a fellow-servant of the injured employee, but was the representative of the defendant. On this question the case of *Chicago & N. W. R'y Co. v. Moranda*, 93 Ill. 302, 14 Am. Neg. Cas. 362, *ante*, was cited and followed.

**Employees injured while assisting in removal of wreck obstructions  
on railroad track.**

In *ABEND v. TERRE HAUTE & INDIANAPOLIS R. R. Co.*, 111 Ill. 202 (1884), blacksmith, directed to assist in removing certain obstructions on the track, killed in collision between wrecking train and another train, judgment for defendant was *affirmed*, the fellow-servant rule being applied. See the *ABEND* case, reported in 11 Am. Neg. Cas. 421.

In WABASH, ST. LOUIS & PACIFIC R'Y CO. v HAWK, 121 Ill. 259 (1887), employee, assisting in removal of wreck, injured by fall of car caused by giving way of prop, whereby he sustained a fracture of the ankle, judgment of Appellate Court for the Second District, affirming judgment for plaintiff in the Circuit Court of Livingston county, was *affirmed*. It was held that the facts in the Hawk case were similar to those in Chicago & Alton R. R. Co. v. May, 108 Ill. 293, 14 Am. Neg. Cas. 387, *ante*, and the law in that case settled the questions presented in the Hawk case. It was also held that the foreman of the wrecking crew was not the fellow-servant of the crew, who were bound to obey his orders, within the meaning of the fellow-servant rule preventing a recovery by an injured servant.

**NOTES OF CASES DECIDED IN THE ILLINOIS SUPREME COURT  
RELATING TO INJURIES TO RAILROAD EMPLOYEES.**

1. Flat car — Collision.
2. Hand car — Collision.
3. Section hand — Track.
4. Switchmen — Struck by cars.
5. Track-repairer.
6. Watchmen.
7. Laborers — Loading and unloading.
8. Miscellaneous.
9. Employees of other railroad corporations.

**1. Flat car — Collision.**

In CHICAGO & ALTON R. R. CO. v. SULLIVAN, 63 Ill. 293 (1872), employee on flat car thrown from car by collision of two parts of a train on a bridge, falling from bridge and fatally injured, judgment for plaintiff in the Circuit Court of Menard county was *affirmed*. It was held that a railroad company is liable for injury to a servant caused by the incompetency of fellow-servant, and that habitual intemperance of a conductor, knowledge of which might have been brought to the company, is sufficient to render company liable for injury resulting therefrom.

**2. Hand car — Collision.**

*Collision between hand car and another car.*

In CHICAGO & ALTON R. R. CO. v. O'BRIEN, 155 Ill. 630 (1895), railroad employee, one of gang of section-men, injured by being thrown from hand car by collision with another car, judgment of Appellate Court for the Third District, affirming judgment for plaintiff in the Circuit Court of McLean county for \$3,500, was *affirmed*. Rehearing denied. See 53 Ill. App. 198.

*Hand car struck by freight car being switched or kicked.*

In LAKE SHORE & MICHIGAN SOUTHERN R'Y CO. v. HUNDT, 140 Ill. 525 (1892), employee removing hand car struck by freight car being switched or "kicked" against him, judgment for plaintiff in the Circuit Court of Cook county, which was affirmed in the Appellate Court for the First District, was *affirmed*.

*Employee jumping from hand car to avoid collision.*

In PEORIA, DECATUR & EVANSVILLE R'Y CO. v. RICE, 144 Ill. 227 (1893), section foreman working on railroad bridge jumping from hand car to avoid collision with train and severely injured, judgment of Appellate Court for the Third District, affirming judgment for plaintiff in the Circuit Court of Logan county for \$5,000, was affirmed. The fellow-servant rule was discussed and numerous authorities cited.

### 3. Section hand—Track.

*Section hand killed by train.*

In PITTSBURGH, CINCINNATI & ST. LOUIS R'Y CO. v. McGRATH, ADM'R, 115 Ill. 172 (1885), section-hand killed by train, judgment of the Appellate Court for the First District, affirming judgment for plaintiff in the Circuit Court of Cook county, was affirmed. See 15 Bradw. (Ill. App.) 85.

In MYERS, ADM'X v. INDIANAPOLIS & ST. LOUIS R'Y CO., 113 Ill. 386 (1885), section-hand struck and killed by a detached part of a train which was accidentally separated, judgment for defendant in the Appellate Court for the Third District, which affirmed judgment in the Circuit Court of Coles county, was reversed for erroneous charge that certain facts constituted negligence as matter of law, the question being for the jury to determine.

### 4. Switchmen struck by cars.

*Switchman killed by train running at excessive speed.*

In LAKE SHORE & MICHIGAN SOUTHERN R'Y CO. v. O'CONNER, ADM'X, 115 Ill. 254 (1885), switchman, attending to his duties, struck and killed by a train running at a greater rate of speed than permitted by an ordinance, judgment of the Appellate Court for the First District, affirming judgment for plaintiff for \$5,000 in the Superior Court of Cook county, was affirmed.

*Switchman struck by car in railroad yard.*

In CHICAGO & NORTHWESTERN R'Y CO. v. DONAHUE, 75 Ill. 106 (1874), switchman struck by moving car in defendant's yards, judgment for plaintiff in the Circuit Court of Cook county for \$5,000 was reversed, the evidence showing that plaintiff knew the condition of affairs in the yards before he took service, and had been there long enough to become familiar with the dangers, and therefore he assumed the risks.

### 5. Track repairer struck by car.

In CHICAGO, ROCK ISLAND & PACIFIC R. R. CO. v. DIGNAN, 56 Ill. 487 (1870), track-repairer struck by freight cars, judgment for plaintiff in the Superior Court of Chicago was affirmed. The case of CHICAGO & N. W. R'Y CO. v. SWEENEY, 52 Ill. 325, distinguished.

### 6. Watchmen struck by cars.

In CHICAGO & EASTERN ILLINOIS R. R. CO. v. GEARY, 110 Ill. 383 (1884), night-watcher, in performance of his duties, struck by the rear car of a train of empty coal cars being backed by the engine of a night crew which was making up a train, whereby he was run over and his elbow crushed, judgment of the Appellate Court for the First District, affirming judgment for plaintiff in the Superior Court of Cook county, was reversed, the injury being caused by the negligence of the foreman of the night crew who was a fellow-servant of the injured employee.

In ST. LOUIS, ALTON & TERRE HAUTE R. R. CO. v. EGGMANN, ADM'R, 161 Ill. 155 (1896), railroad policeman or watchman struck and killed by engine while standing near track and loading his revolver in preparation for his duties, judgment of the Appellate Court for the Fourth District, affirming judgment for the plaintiff in the City Court of East St. Louis for \$5,000, was affirmed. Affirming 60 Ill. App. 291.

See also ST. LOUIS, ALTON & TERRE HAUTE R. R. CO. v. EGGMANN, 65 Ill. App. 346, where judgment on special finding rendered for defendant in the trial court, the verdict being for plaintiff, was reversed.

## 7. Laborers — Loading and unloading cars.

### *Sudden starting of train.*

In LOUISVILLE, EVANSVILLE & ST. LOUIS CONSOLIDATED R. R. CO. v. HAWTHORN, 147 Ill. 226 (1893), railroad laborer engaged in unloading fence posts injured while attempting, under orders of the foreman, to get on car, caused by sudden starting of train, whereby his foot was crushed, judgment of Appellate Court for the First District, affirming judgment for plaintiff in the Circuit Court of Marion county for \$2,000, was affirmed. See 45 Ill. App. 635.

### *Flying switch.*

In CHICAGO & ALTON R. R. CO. v. KELLY, ADM'X, 127 Ill. 637 (1880), construction train making a flying switch on approaching a station, striking a car standing on side track, throwing it against a car which was being loaded with iron by men under a section boss, one of whom, in attempting to reach the platform, was struck and killed by the train, judgment for plaintiff in the Circuit Court of McLean county, which was affirmed by the Appellate Court for the Third District, was affirmed. It was held that Kelly, a section-hand, was not a fellow-servant of the conductor and engineer of the construction train. See also 25 Ill. App. 17; 28 Ill. App. 655.

### *Crushed between cars.*

In LALOR, ADM'X v. CHICAGO, BURLINGTON & QUINCY R. R. CO., 52 Ill. 401 (1869), action, under the statute, for damages for negligent killing of railroad employee, judgment on demurrer to the declaration in the Circuit Court of Cook county was reversed. The court (per BRESEE, Ch. J.) stated the case as follows:

"The declaration in this case alleges that the deceased was employed about the depot grounds and freight house as a common laborer, specially for the purpose of loading and unloading the freight cars, at monthly wages, and for no other or different purpose whatever; that while he was engaged in loading a freight car with pig iron, the deceased was ordered by the superintendent or foreman of the company, employed to manage, direct and superintend the business and affairs of the company about the depot, to couple and connect a freight car with other cars attached to a locomotive, contrary to the special engagement of the deceased, and to do which he was unversed and inexperienced, and which fact was well known to the superintendent, and while so engaged, having to go between the cars for the purpose, the engine was so carelessly managed as to bring the cars together with great force, and while he was so between them, by means of which he was crushed to death.

"The demurrer admits these facts, and they make a strong case for the appellant; not like the cases cited by appellee, *supra*, they show a case of a person injured while engaged in a sphere of employment, and under the command of his

superior, different from the one in which he had engaged to serve. In entering upon his engagement, the deceased may be presumed to have known the perils, usually and necessarily incident to such service, and made his contract accordingly. So, in this case, the deceased engaged to perform work only ordinarily hazardous; he was compelled to do other work extra-hazardous, by which he lost his life, the superintendent knowing he was unskilled and unacquainted with the manner of doing such work when he ordered deceased to perform it. Admitting the deceased was in the same general service as the superintendent, his sphere, however, was a special one, and so subordinate as to compel him to yield implicit obedience to the command of the superintendent. The company was constructively present, by and through this officer, and must be charged accordingly. It was, then, by the direct command of the company the deceased was exposed to this peril, and one out of the line of business he had contracted to perform. He was killed by the negligence of the driver in charge of the locomotive, while thus exposed. The law would be lamentably deficient did it furnish no remedy in such a case. None of the cases cited come up to the facts admitted by the pleadings in this case. Those cases, for the most part, proceed upon the ground that, being fellow-servants, engaged in the same service, a recovery cannot be had for an injury to one so situated, against the common employer; that the doctrine of *respondeat superior* does not apply.

"We place this case on the ground of misconduct of the company in exposing the deceased to this peril, and when so exposed, in so carelessly mismanaging the engine as to cause his death. It is needless, in this view, to consider or comment upon the numerous cases cited. None of them meet this case."

\* \* \* Judgment reversed.

*Person not employee of railroad company killed while unloading cars on track — Railroad liable.*

In *CHICAGO & NORTHWESTERN R'Y CO. v. GOEREL*, 119 Ill. 515 (1887), person not an employee of defendant railroad company but a teamster in employ of owners of freight, employed in unloading cars on a side track, falling from and between cars caused by other cars colliding with the car on which he was standing, and run over and killed, judgment for plaintiff for \$5,000 in the Circuit Court of Cook county, which was affirmed by the Appellate Court for the First District, was affirmed. See 20 Bradw. (Ill. App.) 163.

#### 8. Miscellaneous.

*Defective appliance — Knowledge of danger.*

In *PENNSYLVANIA COMPANY v. LYNCH*, 90 Ill. 333 (1878), employee, while engaged with another employee in transferring a large bale of wool from one freight car to another occupying parallel side-tracks, thrown to the ground in consequence of breaking of temporary platform connecting the cars which they were using, his shoulder being dislocated, judgment for plaintiff in the Superior Court of Cook county for \$6,000 was reversed, the employee being aware of the danger of the use of such a platform, and knowing it to be unsafe, and the defendant not having given any direction to use such platform.

*Fall of lumber — Defective derrick.*

In *PULLMAN PALACE CAR COMPANY v. BLUHM*, 109 Ill. 20 (1884), laborer using defective derrick of defendant in elevating lumber to the upper part of a building hurt by fall of lumber, his arm being broken, judgment of Appellate Court

of First District, affirming judgment for plaintiff in the Superior Court of Cook county for \$3,500, was affirmed.

*Fall of bank of earth.*

In **SIMMONS, ADM'X v. CHICAGO & TOMAH R. R. CO.**, 110 Ill. 340 (1884), laborer engaged in excavating a hill to build a round-house for defendant killed by fall of bank of earth, judgment for defendant in the Circuit Court of Jo Daviess county, affirmed by the Appellate Court for the Second District, was affirmed, the deceased, with knowledge of the danger, having voluntarily continued to work. See 11 Bradw. (Ill. App.) 147.

*Falling from car — Sudden start.*

In **CHICAGO, BURLINGTON & QUINCY R. R. CO. v. BELL, ADM'X**, 112 Ill. 360 (1884), laborer working on embankment on railroad bridge, ordered to assist in unloading stone from a car, falling from car which he had just boarded, the car being started without warning, run over and killed, judgment of the Appellate Court for the Second District, affirming judgment for plaintiff in the Circuit Court of Henderson county for \$3,041.66, was affirmed.

**9. Employees of other railroad corporations.**

In **PENNSYLVANIA COMPANY v. BACKES**, 133 Ill. 255 (1890), employee of another corporation working on side track of defendant company struck by a coal car of defendant company running at greater speed than permitted by ordinance and without giving statutory warning, either by bell or whistle, judgment of the Appellate Court for the First District, affirming judgment for plaintiff in the Circuit Court of Cook county, was affirmed.

In **PENNSYLVANIA COMPANY v. CONLAN**, 101 Ill. 93 (1881), switchman in employ of the Chicago & Alton R. R. Co., gathering up empty cars from off the switches, struck by one of defendant's freight trains backing up along one of its main tracks, and fatally injured, judgment of the Appellate Court for the First District, affirming judgment for plaintiff in the Superior Court of Cook county for \$5,000, was affirmed.

In **CHICAGO & EASTERN ILLINOIS R. R. CO. v. O'CONNOR, ADM'R**, 119 Ill. 586 (1887), employee of another company struck by train of defendant while he was on track at a crossing, run over and one of his legs cut off, judgment of Appellate Court for the First District, affirming judgment for plaintiff in the Superior Court of Cook county for \$5,000, was affirmed. Rehearing denied.

In **LAKE SHORE & MICHIGAN SOUTHERN R'Y CO. v. PARKER, EX'X**, 131 Ill. 557 (1890), engineer, in employ of another railroad, killed by alleged negligence of defendant in leaving a certain switch open, whereby the engine driven by deceased was diverted from its track and caused to collide with another engine on the side track, judgment for plaintiff for \$5,000 in the Circuit Court of Cook county, which was affirmed by the Appellate Court for the First District, was affirmed.

## MOBILE AND OHIO RAILROAD COMPANY v. GODFREY.

*Supreme Court, Illinois, January, 1895.*

[Reported in 155 Ill. 78.]

**LABORER INJURED IN COLLISION BETWEEN TRAINS — FELLOW-SERVANT RULE — QUESTIONS OF LAW AND FACT — ERRONEOUS INSTRUCTIONS.** — Where a servant brings his action against the master for personal injuries alleged to have been caused by the negligence of a co-servant, and the master claims that the injury was caused by a fellow-servant, the court should state the rule that constitutes fellow-servants, and it is for the jury to determine from the evidence whether the injured servant comes within the rule.

The rule of fellow-servant should be correctly stated to the jury under proper instructions by the court, and it is reversible error to ignore the rule and charge, as matter of law, that certain employees were fellow-servants.

In the absence of evidence as to incompetency of servants it was error to give an instruction based on such an element of liability.

So held, in action by laborer for injury sustained in a collision between the work train on which he was riding and another of defendant's trains.

**APPEAL** from the Appellate Court for the Fourth District (52 Ill. App. 564); heard in that court on appeal from the Circuit Court of Jackson county. *Judgment reversed.*

"This case, with one of the same appellant against Fannie Massey, administratrix, was submitted to this court at the May Term, 1894. The titles of both cases were placed at the head of the same statement, etc., and both cases were referred to in the same brief. From a statement made by counsel for appellant the court was induced to believe the identical questions were involved in each, and an opinion having been filed in the case of Mobile & Ohio R. Co. *v.* Massey, 152 Ill. 144 (1), a *per curiam* opinion was filed in the case, without further examination, disposing of this case in the same way as the Massey case. A petition for rehearing was filed, and the court, finding the declaration and instructions were different in this case, granted a

1. In MOBILE & OHIO R. R. CO. *v.* MASSEY, ADM'X, 152 Ill. 144 (1894), railroad laborer, a shoveler, riding on a construction train, killed in collision with a "wild" train, caused by negligence of conductor in failing to properly read a telegraphic order, judgment of the Appellate Court for the Fourth District, affirming judgment for plaintiff in the Circuit Court of Jackson county for \$2,500, was affirmed. The case of Abend *v.* Terre Haute & Ind. R. R. Co., 111 Ill. 202, 11 Am. Neg. Cas. 421, was distinguished on the question of fellow-servants."

rehearing. The facts in evidence as to the cause of injury in this case are substantially the same as in the Massey case and, therefore, are not repeated here.

" The first count of plaintiff's declaration charges that the defendant so carelessly, negligently and recklessly operated, managed and controlled its train on which plaintiff was being carried from his work that it collided with another train of said defendant. The third count alleges that the defendant so carelessly, negligently and recklessly managed, operated and controlled one of its trains on its road that it collided with the locomotive and train of cars on which plaintiff was being carried from his work. The fourth count alleges the defendant carelessly, negligently and recklessly managed, operated, controlled and moved its locomotive and train on which plaintiff was being carried, without a headlight and at a high rate of speed, because of which said train collided with another of defendant's locomotives and trains. The fifth count alleges that it was the duty of defendant to employ and provide reasonable, competent, careful and accomplished servants to manage, control and operate its trains whilst plaintiff was being carried from his work, but the defendant did not regard its duty in that respect, and by reason of the incompetency and unskilfulness of defendant's servants, the train on which he was riding collided with another of defendant's trains. To the second count a demurrer was sustained.

" The plaintiff was in the employ of the defendant as a shoveler on a work train, and one Rathwell was the conductor and foreman and one Cutler the engineer. No evidence was offered as to the skilfulness, competency and carefulness of defendant's servants. The theory of the defense was that Rathwell was the fellow-servant of the plaintiff.

" The court, at the request of the plaintiff, gave instructions 1 and 2, as follows:

" 1. ' In this case, if you believe, from the weight of the evidence, that the injuries complained of in the declaration were received by the plaintiff substantially as is alleged in the declaration, as a result of a collision of two of defendant's engines and trains, and that said collision was the result of the negligence of Ben Rathwell, the conductor of the dirt and construction train, then you should find the defendant guilty.'

" 2. ' The jury is instructed that the Mobile and Ohio Railroad Company is required, by the law, to use reasonable care and

caution in the selection and employment of competent persons to manage its business, so that no unnecessary risks shall be incurred by any of its servants in the discharge of their duties; and if you believe, from the weight of the evidence, that the defendant had not done so, and that the complainant received the injuries complained of in the declaration by reason of such negligence, then the defendant is liable for the injuries sustained, provided the plaintiff was using reasonable care and caution to avoid the injury.'

"And the court was requested by defendant to give instruction No. 7, as follows:

"The court instructs you, that if you believe, from the evidence, that the said conductor, Rathwell, and the said engineer, Cutler, of the said work train, were associated with the plaintiff and others, as laborers or shovelers, in doing the work done in connection with or by the use of the said work train, and that they had been engaged for six or more weeks, and that in doing their work of loading and unloading the train and in running and operating the same, they, as conductor, engineer, fireman, laborers or shovelers, were brought together so that they could mutually see and observe each other, and ascertain whether the said conductor, engineer, fireman and laborers were negligent or careless in the discharge of his or their respective duties, and that from their observation of each other in the discharge of their duties they would or might be enabled to guard against the negligence or carelessness of one another, then, and in such case, the conductor, engineer, fireman and laborers or shovelers were fellow-servants with the plaintiff, and he is not entitled to recover for any injury arising out of negligence on the part of said conductor or engineer on the occasion in question, and you should find the defendant not guilty."

"Which instruction the court refused to give to the jury and the defendant excepted. A verdict and judgment were rendered for \$10,000, and that judgment was affirmed by the Appellate Court, and this appeal is prosecuted."

LANSDEN & LEEK, for appellant.

SMITH, MC ELVAIN & HERBERT, for appellee.

**Phillips, J** — Where a servant brings his action against the master for personal injuries alleged to have been caused by the negligence of a co-servant, and the master denies a right of recovery, claiming the servant injured is a fellow-servant of the

one causing the injury, it is the province of the court to state the rule that constitutes fellow-servants, and it is a question of fact, for the jury to determine from the evidence, whether the different servants are fellow-servants within the rule. *Ind. & St. L. R. Co. v. Morgenstern*, 106 Ill. 216 (1); *Chicago & N. W. R'y Co. v. Moranda*, 108 Ill. 576, 14 Am. Neg. Cas. 362, *ante*; *Lake Erie & W. R. Co. v. Middleton*, 142 Ill. 550 (2); *Pullman Palace Car Co. v. Laack*, 143 Ill. 242, 14 Am. Neg. Cas. 291, *ante*. In such case, it is important that the rule should be correctly stated and the question of fact submitted to the jury for determination under proper instructions.

The first instruction given for the plaintiff wholly disregarded the theory of the defense, and determined the relation of the plaintiff and the conductor as fellow-servants as a question of law, leaving the jury to find, alone, whether the injury to plaintiff was caused by the negligence of the conductor. In this there was error.

No evidence was offered to show that the servants of the defendant in charge of the train were incompetent, careless, or unskilful, and in the absence of such evidence there was nothing on which to base the second instruction. It was not to be presumed because of the happening of the accident alone. It was error to give the second instruction for the plaintiff.

The objections made to other of plaintiff's instructions, under the evidence, are not tenable.

There are certain duties of the master that are non-assignable — that is, when delegated to another that other occupies the relation of vice-principal, for whose negligence and want of care the master is responsible. Among such duties, with the assumption by the servant of the ordinary hazards in such case, are, that he shall exercise reasonable care to see that tools, appliances

1. In *INDIANAPOLIS & ST. LOUIS R. R. Co. v. MORGENSTERN*, ADM'R, 106 Ill. 216 (1883), inspector of rolling stock attending to his duties struck by fall of baggage from a truck which threw him on the track and he was run over and killed, judgment of Appellate Court for the Third District, affirming judgment for plaintiff in the Circuit Court of Coles county, was affirmed.

2. In *LAKE ERIE & WESTERN R. R. Co. v. MIDDLETON*, ADM'X, 142 Ill. 550 (1892), hostler's assistant or "wiper" killed in collision between trains, judgment of the Appellate Court for the Third District, affirming judgment for plaintiff in the Circuit Court of McLean county for \$5,000, was affirmed. The question of fellow-servants was fully discussed and numerous authorities cited. See also 46 Ill. App. 218.

and machinery are reasonably safe, and must use reasonable care that the place where the servant works is reasonably safe; to exercise ordinary care in the selection of superintending fellow-servants, and where he has notice of the unfitness of a fellow-servant, to discharge him; to inform the servant of special dangers of his situation, and of the machinery and appliances with and about which he is employed, where he is uninformed, and, within the rules we have stated in Monmouth Mining & Mfg. Co. v. Erling, 148 Ill. 521, 14 Am. Neg. Cas. 284, *ante*, to use reasonable care to keep in repair machinery, tools and appliances with which and where the servant is employed. Almost all other duties are assignable, and where the master has complied with his non-assignable duty of using ordinary care in the selection of a servant to whom such duties are intrusted, for an injury occurring through such servant's neglect to another servant the master is not responsible, because their relation is that of fellow-servants. One servant may be, in relation to a co-servant, a vice-principal in one relation and a fellow-servant in another, the particular relation depending on the particular duties he is discharging at the time. It is not for the court to determine whether the plaintiff, in relation to Rathwell, was a fellow-servant with him, as conductor. Rathwell also discharged the duties of foreman, and, under proper instructions, it would be a question for the jury to determine if there was negligence on the part of Rathwell, and if so, in what relation it occurred. The seventh of defendant's refused instructions omitted all reference to the duties of Rathwell as foreman, and sought to determine, as a matter of law, that the injuries resulted from his acts as conductor. In this it was erroneous, and it was not error to refuse the same.

For the errors in giving plaintiff's first and second instructions the judgments of the Appellate Court [52 Ill. App. 564] and the Circuit Court are reversed, and the cause remanded to the Circuit Court of Jackson county.

CASES ARISING OUT OF INJURIES TO RAILROAD EMPLOYEES,  
DECIDED IN THE APPELLATE COURTS OF ILLINOIS.

1. Brakemen.
2. Car cleaners.
3. Car repairers.
4. Coupling and uncoupling cars.
5. Conductors.
6. Defective appliances.
7. Derailment.
8. Engineers.
9. Explosions.
10. Falling objects.
11. Firemen.
12. Flying objects.
13. Gripman.
14. Hand cars, etc. — Accidents on.
15. Section hands.
16. Switchmen.
17. Track hands.
18. Watchmen.
19. Yard clerk.
20. Employees of other companies.
21. Miscellaneous.

[NOTE.—Following the plan pursued in relation to actions for Personal Injuries to Employees, involving the Liability of the Master therefor, decided in the Appellate Courts of Illinois, the Special Note of which appears in this volume of AM. NEG. CAS., pages 328 to 335, *ante*, the Editor has compiled notes of cases in the Appellate Courts relating to Railroad Employees, and classified them under the various branches of Railroad Employment, wherever the same are specified, and in this manner the vast number of Appellate Courts decisions on the topics treated herein are conveniently incorporated in this volume. See reference to a similar Special Note on page 328, of this volume, *ante*.]

1. Brakemen.

*Illinois Central R. R. Co. v. Jones*, Adm'r, 11 Bradw. (Ill. App.) 324; brakeman thrown from car which became detached from train and killed; defective appliance; judgment for plaintiff *reversed*; assumption of risk.

*Wabash, St. Louis & Pacific R'y Co. v. Moran*, Adm'x, 13 Bradw. (Ill. App.) 72; brakeman standing on car endeavoring to set brake, fell or thrown to the ground and killed; defective appliance; judgment for plaintiff *reversed* for error in instruction on negligence of parties.

*Chicago & Alton R. R. Co. v. Pratt*, 14 Bradw. (Ill. App.) 346; brakeman falling from defective ladder on car, thrown to ground and run over, one of his legs being injured; judgment for plaintiff *reversed* on ground that evidence failed to charge defendant with notice of alleged defect.

*Wabash, St. Louis & Pacific R'y Co. v. Deardorff* (by next friend), 14 Bradw. (Ill. App.) 401; brakeman injured coupling cars; iron projecting over end gate of the cars loaded with iron; judgment for plaintiff *reversed*; assumption of risk

**Wabash, St. Louis & Pacific R'y Co. v. Mahaffee**, Adm'x, 16 Bradw. (Ill. App.) 290; brakeman killed; judgment for plaintiff *reversed* for erroneous instruction on fellow-servants.

**Flynn, Adm'x, v. Wabash, St. Louis & Pacific R'y Co.**, 18 Bradw. (Ill. App.) 235; brakeman uncoupling cars slipping on ice caused by leakage from pipe on engine, run over and killed; charge directing jury to find for defendant erroneous, as facts were for jury; judgment for defendant *reversed*.

**Ohio & Mississippi R'y Co. v. Bass**, 36 Ill. App. 126; brakeman injured while attempting to uncouple cars in motion; defective appliance; judgment for plaintiff *reversed*; contributory negligence.

**Chicago & Alton R. R. Co. v. Matthews**, 39 Ill. App. 541; brakeman striking bridge and knocked off car; judgment for plaintiff *reversed* for erroneous instruction. See also subsequent decision in 48 Ill. App. 361, where the judgment for plaintiff was *affirmed*.

**Peoria, Decatur & Evansville R'y Co. v. Puckett**, Adm'x, 42 Ill. App. 642; brakeman stepping into hole on track and killed by train; judgment for plaintiff for \$2,500 *reversed*; assumption of risk; erroneous instructions.

**Ohio & Mississippi R'y Co. v. Wagelin**, Adm'r, 43 Ill. App. 324; brakeman killed by coupling cars; defective appliance; judgment for plaintiff for \$2,000 *affirmed*.

**Wisconsin Central R. R. Co. v. Ross**, Adm'x, 43 Ill. App. 454; brakeman jolted from car, run over and killed; defective track; judgment for plaintiff *affirmed*.

**Atchison, Topeka & Santa Fe R. R. Co. v. Alsdurf**, 47 Ill. App. 200; brakeman killed; assumption of risk; judgment for plaintiff *reversed*.

**Illinois Central R. R. Co. v. Pirtle**, Adm'r, 47 Ill. App. 498; brakeman killed in wreck caused by cars leaving rails; judgment for plaintiff *affirmed*.

**St. Louis, A. & T. H. R. R. Co. v. Corgan**, 49 Ill. App. 229; brakeman run over by train; negligent and incompetent engineer; judgment for plaintiff *reversed* for admission of improper evidence.

**Mobile & Ohio R. R. Co. v. Harmes**, 52 Ill. App. 649; brakeman thrown from car while setting the brake, due to defective appliance, run over and arm crushed; judgment for plaintiff for \$5,000 *affirmed*.

**Illinois Central R. R. Co. v. Harris**, 53 Ill. App. 592; brakeman coupling cars caught between deadwoods of two cars and arm and hand crushed; judgment for plaintiff for \$8,000 *reversed* for misleading instruction. See also 63 Ill. App. 172 (which seems to be another appeal in the Harris case), where judgment for plaintiff for \$8,000 was *affirmed*.

**Illinois Central R. R. Co. v. Barslow**, 55 Ill. App. 203; brakeman attempting to couple parts of train, injured by glove upon his hand catching in crack on under side of coupling link, and fingers crushed; judgment for plaintiff *reversed*; failure to show defendant's knowledge of defect.

**Cleveland, Cincinnati, Chicago & St. Louis R'y Co. v. Selsor**, 55 Ill. App. 685; brakeman on freight train attempting to couple freight car to tender of engine, injured by hand being crushed; judgment for plaintiff for \$5,000 *reversed* for erroneous instructions.

**Illinois Central R. R. Co. v. Sanders**, 58 Ill. App. 117; brakeman and switchman coupling cars injured by foot catching under one of the ties, by reason of which the car struck him and threw him forward whereby one of his legs was run over and crushed; judgment for plaintiff *reversed* for erroneous instructions.

**Illinois Central R. R. Co. v. Orr**, 59 Ill. App. 260; brakeman injured by arm

being caught between deadwood of cars, on account of absence of draw-bar from one of the cars; judgment for plaintiff for \$1,000 *affirmed*.

*Chicago & Great Western R'y Co. v. Armstrong*, 62 Ill. App. 228; brakeman on ladder of freight car trying to get on top of car to set brakes, give signals, etc., on train breaking in two, seriously injured by falling between engine and car, the train running at about thirty miles an hour; defective car; alleged absence of handhold; judgment for plaintiff for \$12,000 *reversed*, the evidence disproving that there was no handhold upon the car.

### 2. Car cleaners, etc.

*Chicago & Alton R. R. Co. v. Murphy*, 17 Bradw. (Ill. App.) 444; cleaner and wiper attempting to jump on footboard of engine stepping into hole on track and his foot crushed by engine; judgment for plaintiff *reversed*; assumption of risk.

*Chicago & Eastern Illinois R. R. Co. v. Gill*, 37 Ill. App. 61; employee cleaning car injured by other cars run against it; judgment for plaintiff *reversed*; evidence not sustaining verdict.

*Chicago, Milwaukee & St. Paul R. R. Co. v. Krueger*, 23 Ill. App. 639; employee washing cars on track struck by moving car; judgment for plaintiff for \$2,000 *affirmed*.

*Clay v. Chicago, Burlington & Quincy R. R. Co.*, 56 Ill. App. 235; employee under engine, cleaning ashes out of ash pan, injured by leg being cut off by engine being started while he was working under it; judgment for defendant *affirmed*. fellow-servant rule.

### 3. Car repairers.

*Illinois Central R. R. Co. v. Winslow*, 56 Ill. App. 462; car-repairer injured while under car; judgment for plaintiff *reversed*; disobedience of rules; contributory negligence.

*Chicago & Alton R. R. Co. v. Hoyt*, 16 Bradw. (Ill. App.) 237; carpenter on top of cars inspecting same, thrown to ground while stepping from one car to another owing to sudden jerk of train; judgment for plaintiff *reversed*; fellow-servant rule.

### 4. Coupling and uncoupling cars.

*Chicago & Alton R. R. Co. v. O'Bryan*, 15 Bradw. (Ill. App.) 135; railroad employee caught between bumpers of cars and fatally injured; judgment for plaintiff *reversed*; injury caused by fellow-servants.

*Peoria, D. & E. R'y Co. v. Puckett*, Adm'r, 52 Ill. App. 222; employee killed while uncoupling car; judgment for plaintiff *reversed*. See also 42 Ill. App. 642.

*East St. Louis Connecting R'y Co. v. Shannon*, 52 Ill. App. 421; employee injured while coupling cars; judgment for plaintiff *reversed* for erroneous instructions.

### 5. Conductors.

*Lake Shore & Michigan Southern R. R. Co. v. Hunt*, Adm'x, 18 Bradw. (Ill. App.) 288; conductor of freight train, sleeping in caboose, killed in collision with train; contributory negligence; judgment for plaintiff *reversed*.

See *Chicago, Burlington & Quincy R. R. Co. v. Warner*, 22 Ill. App. 462 (1887), where judgment for plaintiff for \$6,500 was *affirmed*.

**6. Defective appliances.**

*Goff v. Toledo, St. Louis & Kansas City R. R. Co.*, 28 Ill. App. 529; employee, member of wrecking crew, injured by the breaking of a rope; judgment for defendant on demurrer *reversed*, a sufficient cause of action having been made out.

*East St. Louis Connecting R'y Co. v. Dwyer*, Adm'x, 41 Ill. App. 522; employee fatally injured by defective jack-screw; judgment for plaintiff *reversed*; insufficiency of declaration.

**7. Derailment.**

*Chicago & Alton R. R. Co. v. Dunn*, 23 Ill. App. 148; employee's arm broken by derailment of caboose in which he was riding; judgment for plaintiff for \$500 *reversed*, the evidence failing to show negligence on defendant's part.

**8. Engineers.**

*Chicago, Burlington & Quincy R. R. Co. v. Clark*, 2 Bradw. (Ill. App.) 596; engineer injured in collision of his train with a "wild" train belonging to another company; judgment for plaintiff for \$3,900 *reversed*; assumption of risk.

*Chicago, Burlington & Quincy R. R. Co. v. Abend*, Adm'r, 7 Bradw. (Ill. App.) 130; engineer found unconscious on track; alleged to have been caused by defective construction of bridge and trestle work; judgment for plaintiff *reversed*; assumption of risk.

*Chicago, Burlington & Quincy R. R. Co. v. Young*, 26 Ill. App. 115; engineer jumping from engine to avoid collision; judgment for plaintiff *reversed* for erroneous admission of certain evidence, etc.

*Illinois Central R. R. Co. v. Neer*, 26 Ill. App. 356; engineer killed in collision between trains; judgment for plaintiff for \$5,000 *reversed*; assumption of risk. See also 31 Ill. App. 126, where a judgment for plaintiff on a subsequent trial was again *reversed*.

*Ohio & Mississippi R'y Co. v. Robb*, Adm'r, 36 Ill. App. 627; engineer fatally injured in collision with "wild" train; judgment for plaintiff for \$5,000 *reversed*; assumption of risk; fellow-servant.

*Illinois Central R. R. Co. v. Quirk*, Adm'r, 51 Ill. App. 607; locomotive engineer killed in railroad wreck; act of third party; railroad not liable; judgment for plaintiff for \$3,000 *reversed*.

*Elgin, Joliet & Eastern R'y Co. v. Malaney*, 59 Ill. App. 114; locomotive engineer running switch engine injured in collision with a car being pushed by another switch engine in charge of other employees of defendant; judgment for plaintiff for \$5,000 *reversed*; fellow-servant rule applied.

*Illinois Central R. R. Co. v. Creighton*, 63 Ill. App. 165; engineer injured; defective engine; judgment for plaintiff *affirmed*. See also former decision in 53 Ill. App. 45.

*Chicago & Alton R. R. Co. v. Du Bois*, 56 Ill. App. 181; locomotive engineer killed by explosion of boiler of engine; judgment for plaintiff for \$5,000 *reversed* for erroneous instructions. See also 65 Ill. App. 142.

**9. Explosions.**

*Chicago & Alton R. R. Co. v. Brandau*, Adm'x, and *Chicago & Alton R. R. Co. v. Hastings*, Adm'x, 65 Ill. App. 150; and *Chicago & Alton R. R. Co. v. Du Bois*, 65 Ill. App. 142, actions arising out of the explosion of a locomotive boiler, whereby Du Bois, the engineer, Brandau, the fireman, and Hastings,

the forward brakeman, sustained injuries resulting in their death; judgment for plaintiffs in each case *reversed*, the evidence failing to disclose negligence of the railroad company or the cause of the explosion.

*Chicago & St. Louis R. R. Co. v. Ashling*, Adm'r, 34 Ill. App. 99; railroad employee, a hostler, killed by explosion of boiler of locomotive; judgment for plaintiff *reversed* for erroneous instructions, etc.

#### 10. Falling objects.

*Chicago & Northwestern R. R. Co. v. Scheuring*, 4 Bradw. (Ill. App.) 533; employee in railroad shops and yards injured in lifting and moving materials; fall of appliance, part of engine, upon plank which broke and injuring plaintiff's hand; judgment for plaintiff for \$6,000 *reversed*; fellow-servant rule.

*Chicago, Burlington & Quincy R. R. Co. v. Merckes*, 36 Ill. App. 195; railroad employee, hauling heavy iron frame from machine shop to roundhouse, injured by fall of the frame; judgment for plaintiff *reversed*; fellow-servant rule.

*Chicago, Rock Island & Pacific R'y Co. v. Becker*, 38 Ill. App. 523; employee injured by fall of a door; judgment for plaintiff *reversed*, it being held that no cause of action was shown.

*East St. Louis Connecting R'y Co. v. Enright*, 47 Ill. App. 494; employee injured by fall of telegraph pole; judgment for plaintiff *affirmed*.

#### 11. Firemen.

*Union Railway & Transit Co. v. Leahy*, 9 Bradw. (Ill. App.) 353; fireman injured while clearing the ash pan under his engine, his left leg being run over as engine started; judgment for plaintiff for \$2,201 *reversed*; failure to show negligence on defendant's part.

*Wabash, St. Louis & Pacific R'y Co. v. Conklin*, Adm'r, 15 Bradw. (Ill. App.) 157; fireman killed while cleaning ash pan of his engine, caused by work train crashing into train; judgment for plaintiff *reversed*; contributory negligence, etc.

*Chicago, Milwaukee & St. Paul R'y Co. v. Standart*, 16 Bradw. (Ill. App.) 145; fireman jumping from engine which collided with obstruction on track, injured by spraining his ankle; judgment for plaintiff *reversed* for erroneous instruction on degree of care required of railroad company.

*Illinois Central R. R. Co. v. Hosler*, Adm'r, 45 Ill. App. 205; fireman killed in collision; negligence of engineer; judgment for plaintiff *reversed*; fellow-servant rule applied.

*Illinois Central R. R. Co. v. Swisher*, 61 Ill. App. 611; fireman injured by reason of a switch being left open, causing passenger train on which he was fireman to leave main track and run upon a passing track; judgment for plaintiff *reversed*; risks of employment; fellow-servants, etc. See also former decision in 53 Ill. App. 411.

*Illinois Central R. R. Co. v. Meyer*, 65 Ill. App. 531; fireman jumping from engine to avoid collision run over and foot and leg crushed; judgment for plaintiff *reversed* for erroneous instructions, etc.

#### 12. Flying object.

*Chicago & Alton R. R. Co. v. Mahoney*, 4 Bradw. (Ill. App.) 263; boiler-maker injured by piece of steel separating from tool with which he was working, entering his eye and destroying sight; judgment for plaintiff *reversed* for erroneous instructions.

### 18. Gripman.

*West Chicago Street R. R. Co. v. Dwyer*, 57 Ill. App. 440; gripman injured by defective brake-handle on cable car; judgment for plaintiff for \$7,000 affirmed; a gripman and a wrecking crew are not fellow-servants.

### 14. Hand cars, etc.—Accidents on.

*Toledo, St. Louis & Kansas City R. R. Co. v. Conroy*, 39 Ill. App. 351; employee injured by hand car which was derailed; judgment for plaintiff affirmed.

*Pittsburgh, Cincinnati & St. Louis R'y Co. v. Goss*, 13 Ill. App. 619; employee on hand car injured in collision with train; judgment for plaintiff reversed on ground of contributory negligence.

*Chicago & Alton R. R. Co. v. McDonald*, 21 Ill. App. 409; shoveler on construction train injured in collision; negligence of conductor and engineer; judgment for plaintiff for \$6,260 reversed; fellow-servant rule applied.

*Chicago, Burlington & Quincy R. R. Co. v. Blank*, 24 Ill. App. 438; laborer, engaged in loading gravel on cars under direction of conductor, killed by being thrown from flat cars and run over, due to alleged reckless order of conductor to uncouple car; judgment for plaintiff for \$2,150 affirmed.

*Peoria, Decatur & Evansville R'y Co. v. Johns*, 43 Ill. App. 83; laborer, unloading car, knocked down by car which was pushed against him by engine which was defective, whereby he was run over and foot injured; judgment for plaintiff reversed for erroneous instructions, etc.

### 15. Section hands.

*Chicago, Burlington & Quincy R. R. Co. v. Peterson*, 32 Ill. App. 138; section-hand injured in collision between hand car and engine; judgment for plaintiff reversed; evidence insufficient.

*Louisville, Evansville & St. Louis Con. R'y Co. v. Allen, Adm'x*, 47 Ill. App. 465; section-band killed by defective appliance; judgment for plaintiff reversed; assumption of risk.

*St. Louis, Alton & Terre Haute R. R. Co. v. Biggs*, 53 Ill. App. 550; section-hand, riding on pile-driver, injured in collision with car standing on side track; judgment for plaintiff for \$3,000 affirmed.

*Mischke v. Chicago, Burlington & Quincy R. R. Co.*, 56 Ill. App. 472; section-boss, contrary to rules, took his wife upon hand car, and, endeavoring to save his wife from collision with engine had four of his toes cut off; no right of recovery; judgment for defendant affirmed.

### 16. Switchmen.

*Chicago, Rock Island & Pacific R. R. Co. v. Henry, Adm'x*, 7 Bradw. (Ill. App.) 322; switch-tender and brakeman coupling cars killed while between car loaded with wheels and car with grain, the impact of the cars throwing wheels off car and upon deceased; judgment for plaintiff for \$4,000 reversed; erroneous admission of certain evidence on a question of damages.

*Chicago & Eastern Illinois R. R. Co. v. Hagar*, 11 Bradw. (Ill. App.) 498; switchman falling in front of moving car; defective appliance; judgment for plaintiff reversed for erroneous instruction implying that railroad company was an insurer of safe condition of cars.

*Wabash, St. Louis & Pacific R'y Co. v. Fenton*, 12 Bradw. (Ill. App.) 417; yard switchman in position to couple cars struck by a piece of the draw-bar

which broke, knocking him on the rail and his right leg run over by car; judgment for plaintiff for \$8,000 *reversed* for erroneous instructions.

*Chicago & Alton R. R. Co. v. Few*, 15 Bradw. (Ill. App.) 125; switchman catching foot in frog, thrown upon track and his left arm run over by flat car; judgment for plaintiff *reversed* for erroneous admission of certain evidence on the question of damages, etc.

*Chicago, Burlington & Quincy R. R. Co. v. Montgomery*, 15 Bradw. (Ill. App.) 205; switchman's hand and arm injured while attempting to uncouple "foreign" cars; risk of employment; judgment for plaintiff *reversed*.

*Whalen, Adm'r, v. Illinois & St. Louis R. R. & Coal Co.*, 16 Bradw. (Ill. App.) 320; switchman coming into contact with corner of scale shed of defendant, knocked from engine, run over and killed; judgment on verdict directed for defendant was *reversed*, the facts being for jury.

*Chicago, Burlington & Quincy R. R. Co. v. Smith, Adm'x*, 18 Bradw. (Ill. App.) 119; switchman, uncoupling cars, caught foot between rails, run over and killed; judgment for plaintiff *reversed*; assumption of risk.

*Chicago & Alton R. R. Co. v. Stites*, 20 Bradw. (Ill. App.) 648; yard switchman injured in jumping from engine to avoid collision; defective switch; judgment for plaintiff for \$3,550 *reversed*; knowledge of defect must be shown; failure to prove allegation of defendant's negligence. See also subsequent decision on appeal in the *Stites* case, where judgment for plaintiff was again *reversed* on the grounds of former ruling, 26 Ill. App. 430.

*Chicago, Rock Island & Pacific R'y Co. v. Touhy*, 26 Ill. App. 99; switchman injured; negligence of engineer; judgment for plaintiff *reversed* for contributory negligence; fellow-servant rule also applied.

*Chicago, Burlington & Quincy R. R. Co. v. Fitzgerald, Adm'x*, 40 Ill. App. 476; employee killed in collision while making up trains in switch yard; judgment for plaintiff *reversed* for erroneous exclusion and admission of evidence.

*Chicago & Great Western R. R. Co. v. Travis, Adm'r*, 44 Ill. App. 466; switchman killed by falling from and under engine; defective appliance; judgment for plaintiff *reversed*; knowledge of defect; assumption of risk.

*Illinois Central R. R. Co. v. Morrissey*, 45 Ill. App. 127; switchman injured by foot catching in guard rail; judgment for plaintiff *reversed*; erroneous instructions.

*Peoria, Decatur & Evansville R'y Co. v. Hardwick*, 48 Ill. App. 562; switchman injured by footboard of engine coming in contact with plank at crossing, throwing him under engine; judgment for plaintiff for \$13,200 *reversed* for erroneous instructions and excessive damages.

*Elgin, Joliet & Eastern R'y Co. v. Docherty, Adm'r*, 66 Ill. App. 17; switchman attempting to get upon moving car falling from same, caused by breaking of brake staff, run over and killed; judgment for plaintiff *reversed*; violation of rules.

*Illinois Central R. R. Co. v. Weiland*, 67 Ill. App. 332; switchman injured; defective brake; hand and fingers crushed; judgment for plaintiff *affirmed*.

## 17. Track hands.

*Chicago & Northwestern R'y Co. v. Bliss, Adm'x*, 6 Bradw. (Ill. App.) 411; trackman killed by handle of hand car, the wheel of which car was violently struck by snow-plough; judgment for plaintiff for \$1,683.75, *reversed* for contributory negligence of deceased and his fellow-servants.

*Miller v. Ohio & Mississippi R'y Co.*, 24 Ill. App. 326; track-repairer ordered

by section boss to remove sand and gravel from a car, thrown from car and leg run over, owing to negligence of engine driver; direction of verdict for defendant proper; fellow-servant rule applied.

*Chicago, St. Louis & Pittsburgh R. R. Co. v. Gross*, 35 Ill. App. 178; track-hand fatally injured by being run over by train; judgment for plaintiff affirmed.

*Chicago & Eastern Illinois R. R. Co. v. Shannon*, Adm'r, 43 Ill. App. 540; track-repairer in switch yard killed by a moving train; judgment for plaintiff for \$1,000 affirmed.

#### 18. Watchmen.

*Lake Shore & Michigan Southern R'y Co. v. Roy*, 5 Bradw. (Ill. App.) 82; night watchman falling from foot-board of engine in company's yard, and hand cut off by wheels passing over it; judgment for plaintiff for \$5,000 reversed; against weight of evidence; contributory negligence.

#### 19. Yard clerk.

*East St. Louis Connecting R'y Co. v. O'Hara*, 59 Ill. App. 649; night yard clerk caught between cars and thumb injured; judgment for plaintiff for \$1,300 reversed; risks of employment.

#### 20. Employees of other companies.

*Chicago & Eastern Illinois R. R. Co. v. Holland*, 18 Bradw. (Ill. App.) 418; conductor, in employ of another railroad, injured in collision caused by negligence of defendant's servants; judgment for plaintiff for \$25,000 affirmed; damages not excessive where injured party was a hopeless and almost total wreck.

*O'Sullivan, Adm'r, v. Chicago, Milwaukee & St. Paul R. R. Co.*, 23 Ill. App. 646; switchman, in employ of another company, struck by defendant's engine and killed; judgment for defendant reversed for erroneous instruction ignoring plaintiff's theory of the case and submitting only that of defendant.

*Fitzpatrick v. Chicago & Western Indiana R. R. Co.*, 31 Ill. App. 649; employee of another company fatally injured by the fall of a tool from a part of the roof of station under construction by sub-contractors; railroad not liable for the negligence of contractors' servants.

#### 21. Miscellaneous.

*Tower man injured*. — *Lake Shore & Michigan Southern R'y Co. v. Conway*, 67 Ill. App. 155; derailed car striking tower house, stove upset, and employee in tower house injured; judgment for plaintiff for \$9,000 affirmed.

*Falling from engine*. — *Glass v. Chicago, Rock Island & Pacific R'y Co.*, 41 Ill. App. 87; employee falling from engine and striking against switching post; judgment for defendant affirmed.

*Falling from scaffold*. — *Chicago & Alton R. R. Co. v. Maroney*, 67 Ill. App. 618, brickmason injured by falling from scaffold; judgment for plaintiff affirmed.

*Minor employee struck by car*. — *Chicago & Northwestern R'y Co. v. Kane*, 50 Ill. App. 100; minor employee struck by car in railroad yard; contributory negligence; judgment for plaintiff reversed.

*Facts not stated*. — *Wabash, St. Louis & Pacific R'y Co. v. Wallace*, 16 Bradw. (Ill. App.) 259; facts not stated but simply a ruling that plaintiff and another were fellow-servants, and judgment for plaintiff reversed.

**ILLINOIS CENTRAL RAILROAD COMPANY V.  
COX, ADM'X.***Supreme Court, Illinois, November Term, 1858.*

[Reported in 21 Ill. 20.]

**FELLOW-SERVANTS.** — Where competent servants have been selected to perform a duty, one of them cannot recover against the master for the carelessness of a fellow-servant.

**ASSUMPTION OF RISK.** — It will be understood that each servant who engages in a particular business, calculates the hazards incident to it, and contracts accordingly.

**SERVANT OF CONTRACTOR KILLED BY NEGLIGENCE OF SERVANTS OF RAILROAD COMPANY — FELLOW-SERVANTS.** — Where A. contracts to deliver wood to a railroad company, the company to furnish the equipment to move it the men on the train to obey the orders of the contractor, and one of the servants employed by him to load wood upon the car is thrown off the car and killed: *Held*, that the parties were all servants of the company, and that no recovery could be had by the administratrix of the deceased, the injury being caused by his fellow-servants (1).

**APPEAL** from judgment for plaintiff for \$1,000 in the Union Circuit Court. *Judgment reversed.*

The declaration was in case, and contained five counts, setting forth that the appellant, being the owner of the Illinois Central Railroad, and the locomotives, engines and cars running thereon, did, by and through its servants and employees, so carelessly misdirect and mismanage a locomotive and cars, running on said railroad, as to carelessly, negligently and unskilfully cause a collision, whereby one Othneile Cox, who was employed as a servant on said cars by defendant, was killed; to the damage

1. The Cox case, 21 Ill. 20 (the case at bar) is a leading case on the fellow-servant rule, and is frequently cited as an authority in cases where the question as to what constitutes service under a common master is involved.

In *MOSS ET AL. v. JOHNSON*, 22 Ill. 633 (1859), it was held that a person who obtrudes himself upon a locomotive or cars, in order to be carried to his place of work, is not a passenger, and cannot recover for an injury sustained by a derailment of the train. It was also held that a person who has a contract with parties running a railroad,

as an employee, going upon a train, with full knowledge of the condition of the road, and its management, cannot recover for injuries he may sustain. In this case the defendants were lessees and proprietors of the Peoria and Quawka Railroad, and the plaintiff was injured by having his legs broken in a derailment of the train on which he had voluntarily placed himself to ride to work. Judgment for plaintiff for \$4,000 was reversed, on the grounds stated in the foregoing rulings, decided on the authority of Ill. Cent. R. R. Co. v. Cox, 21 Ill. 20.

of the plaintiff of \$5,000. To said declaration the defendant pleaded *not guilty*, and a further plea, which is set out in the opinion. Upon these pleas issue was taken; and the cause was tried at May Term, A. D., 1857, of the Union Circuit Court, before Parrish, J., and a jury.

Upon said trial, the plaintiff introduced Green Bridges, who testified that he was present when Othneile Cox was killed, which was on the 9th of February, 1855. He was killed by a train of cars running on the Illinois Central Railroad, which were, at the time, engaged in hauling wood. The circumstances under which Cox lost his life were about these: In the morning before he was killed, we all got on the train, and went down the road from Anna after a load of wood. When the cars were loaded, they were started. Cox and myself were standing together on the cars, for a time, after which I moved my position to another place on the cars, in front, rather, of where Cox was standing. Cox was standing up against the wood with his face turned towards the rear of the train. The train was running rather fast, and just as we came to a train on the side track, I turned my head and saw the wood on the cars tumbling off. The wood struck the cars on the side track, which shoved it back against Cox's leg, and tripped him up and threw him off the cars. The moment I saw him fall, I hallooed as loud as I could to have them stop the train, but the train still went on. I saw a young man standing in front of me on the train; I then motioned my hand to him. The young man immediately pushed open the door of the caboose car, and the conductor came running out of the caboose car and asked what was the matter. I informed him, and he wheeled right round and ran back and whistled, and the train was stopped; we ran back to where Cox was thrown off, and there lay Cox, dead. He was covered with mud, as if he had been rolled over in the mud for some little distance; one of his feet was nearly cut off; his thigh was broken so that the bones stuck out; there were cuts over each eye, and a large gash on the back of his head, so that we could see his skull bone. Cox never moved after I went back. I was well acquainted with him. Witness stated that Cox left children and also a widow, the plaintiff in this suit. The locomotive and cars upon which Cox was at the time he was killed were called the Illinois Central Railroad Company's. The engineer's name was Travis; the conductor's Wight. The wood hauled was used along the line

of said railroad. The wood that knocked Cox off was knocked off the train by running against another train. It looks as if the conductor and engineer might have seen the car standing upon the side track if they had looked out. Our speed was not slackened up as we came to the switch. Do not know Travis's character as an engineer; if he was drunk, I do not know it; did not see him drink; do not know that he was in the habit of drinking. The wood was not over the edge of our cars.

Cross-examined:— Bennett was a contractor on the road to furnish wood. Bennett and Scott had the locomotive and cars under their control for that purpose. They sent the train where they pleased. I thought that Cox was employed by Bennett; that we were all employed by him. Can give no opinion as to the competency of conductor or engineer. Had known Cox five or six years; he was industrious, but sometimes drank too much liquor. Bennett was hauling wood for the company; taking it to stations along the road for the company.

Philip Cruse testified that he had known Cox eight or ten months. Cox's family were dependent upon his labor for a living. Witness drank with Travis between seven and nine o'clock on the morning of the day that Cox was killed — thought that he was a little tight.

The defendant introduced Wm. W. Bennett, who testified as follows: At the time that Cox was killed, I was a contractor on the road. My business was to furnish wood to the company, and build fence. Mr. Scott, my partner, and myself, had charge of the train off of which I suppose Cox was thrown and killed. We had charge of the train, and the men on the same had to obey our orders. Mr. Cox was in our employ at the time. We sent the train out that morning. I had known Travis at least eight months before Cox was killed. He was regarded as one of the best engineers on the road; that was his character. He was skilful, careful and competent. I regarded him as a very superior man in that business. I had known Wight for three months. He had been very successful, and bore a good reputation as a conductor. Cox was generally a sober man, but would sometimes get drunk. My contract with the company, as to furnishing wood, was this: It was to be furnished at a certain price, and the company were to furnish a train of cars, locomotive, engineer, conductor and fireman, and the balance of the hands necessary. Mr. Scott and myself were to furnish ourselves.

They did furnish us a conductor, engineer and fireman. Cox was in our employ at the time of his death. It was only a few days at a time that the train was furnished us, when we would call in all the hands needed. Bennett and Scott were always held responsible for the management of the train, by the superintendent, and the officers that the company furnished us were subject to our direction and control. We could stop them at any time.

The jury found the defendant guilty, and assessed the damages at \$1,000. A motion for a new trial was overruled.

The court rendered judgment in favor of plaintiff, for the sum of \$1,000 and costs of suit. The defendant appealed to this court, and now assigns the following causes of error: That the verdict was against the law and the evidence; that the verdict was against the instructions of the court; that the court erred in refusing to grant a new trial, and in rendering judgment.

J. M. DOUGLAS and ISHAM N. HAYNIE, for plaintiff in error.

R. S. NELSON, for defendant in error.

**Breee, J.** — This action is brought under the first section of the act entitled "An act requiring compensation for causing death by wrongful act, neglect or default," approved February 12, 1853. Scates' Comp. 422.

That section is in these words: "Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action, and recover damages in respect thereof, then, and in every such case, the person who, or company or corporation which would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony."

This action is brought by the widow of Othneile Cox, alleged to have been killed by the negligence of the defendants, in running their train. The declaration contains five counts, to each of which a separate demurrer was interposed, which was sustained by the court, and the plaintiff took leave to amend each count. To this amended declaration, and to each count thereof, the defendants again interposed a demurrer, which was sustained to all the counts except the first — to that it was overruled.

The first count is as follows, omitting the formal parts: "For that whereas heretofore, on the ninth day of February, in the year of our Lord one thousand eight hundred and fifty-five, and in the lifetime of the said Othneile Cox, who is deceased, at the county of Union and State of Illinois, the said defendants being then and there the owner of, and in the possession of, the Illinois Central Railroad and the locomotives and cars thereon, did then and there, by their agents, employees and hands, and by their negligence, carelessness and unskilfulness, and wrongful act of the same, kill, by running their said cars and locomotive on, against, and over the body of the said Othneile Cox, the intestate and husband of the said plaintiff, thereby, then and there, by the said wrongful act, negligence, carelessness and unskilfulness of the said defendant, causing the death of the said Othneile Cox, contrary to the form of the statute in such case made and provided, and to the damage of the said plaintiff as such administratrix, of five thousand dollars;" concluding with profert of the letters of administration.

To this count the defendants pleaded four pleas, not guilty and three special pleas. To the second, third and fourth, the plaintiff demurred, and the court sustained the demurrer as to the second and fourth, leaving the first and third pleas, on which issues of fact were made up.

The third plea is as follows: And for a further plea in this behalf, the said defendants say, *actio non*, because they say that the said locomotive, steam engine and cars, in the plaintiff's declaration mentioned, were driven upon, and against, and came in collision with the said cars, locomotives, steam engines upon which the said Othneile Cox then was, in manner and form as in the said declaration is alleged, solely by and through the carelessness, negligence, unskilfulness and default of the said servants of the defendants in the declaration mentioned in that behalf, and for want of due care and attention by them, and not through any other negligence, unskilfulness, default or want of due care and attention, and the said engine and cars in the declaration in that behalf mentioned were respectively under the guidance, government and direction of the said several servants of the said defendants in the declaration mentioned, and of no other person or persons, and that the said Cox, at the said time when, etc., was also a servant and in the employment of the said defendants in said declaration in this behalf mentioned, upon

their said railroad; and that the said carelessness, negligence, unskilfulness and default, and want of due care and attention, of the said servants of the said defendants in the declaration in that behalf mentioned, at the said time when, etc., and were wholly unauthorized by the said defendants, and were entirely without the leave or license, knowledge, sanction, or consent of the said defendants; and concluding with a verification.

There is no formal replication to this plea. It is traversed, in brief, by the words: "Traverse and issue to the country." To give this the force and effect of a formal replication, it will be seen that it traverses the fact that the locomotive and cars were under the guidance and direction of the defendant's servants; that the deceased was one of those servants; that the defendants did not authorize such carelessness, negligence and unskilfulness. This must either be considered as a general traverse, or regarded as a nullity, and a repleader awarded, but the parties have treated it as a general traverse, and it will be so considered.

Under the plea of not guilty, it is incumbent on the plaintiff to make out his case substantially as stated in his declaration. He was required to show that the defendants were in the possession and owners of the railroad, and locomotives and cars thereon, and that by their agents, employees and hands, and by their negligence, carelessness and unskilfulness, and wrongful act, by running their said cars and locomotive on, against, and over the body of said Cox, they thereby caused the death of Cox; and the pleadings bring up the question whether the deceased, being the servant of the defendants, and they the common master of many servants, all engaged at the same time in the same business, are answerable "for the wrongful act, neglect or default" of one of the servants, by which another servant is injured.

The declaration does not state in what capacity the deceased was on the train — whether as a passenger, or as one of the servants or hands — but the special plea affirming that he was one of the servants, and which fact is put in issue by the general traverse, is established by the proof. We shall consider, for the purposes of this case, that all the parties, as well Bennett and Scott as their hired hands, were, all of them, employees of the company, and the jury have found the death was caused "by their wrongful act, neglect or default."

We consider it as proved that all the persons engaged on the

train were employed by the company in the same service, and the jury were told by the court :

*First.* That a railroad company, or other corporation, are not responsible for injuries to their servants or agents occasioned by the carelessness, negligence or unskilfulness of fellow-servants, while acting in the same service, without their knowledge or sanction, provided such company or corporation have taken proper care to engage competent servants to perform the duty assigned them; or if the person injured was acquainted with the character of his fellow-servants for capacity or unskilfulness, while engaged as such servant.

*Second.* That, in this case, if Othneile Cox was, at the time of his injury, in the employment of the Illinois Central Railroad Company (provided the jury are satisfied, from the evidence, that he was in their employment), and in the discharge of his duties as such; and, further, if they believe, from the evidence, that the injury complained of was occasioned either by his own carelessness, unskilfulness or negligence, or that of his fellow-servants in the same line of service, they should find for the defendants, provided they have exercised proper care in the selection of competent servants.

*Third.* That when Othneile Cox entered into the service of the railroad company (if the jury should believe, from the evidence, that he was in their service at all), he thereby virtually undertook to run all the ordinary risks incident to his employment, including his own negligence or unskilfulness, or the negligence or unskilfulness of his fellow-servants in the same employment, or necessarily connected therewith.

*Fourth.* That it is presumed in law that his wages were commensurate with the hazard to which he was exposed.

*Fifth.* The true principle is, that when the servant of a company engages in their service, he undertakes, as between himself and his employer, to run all the ordinary risks of the service which he undertakes; and this includes the risk of occasional negligence or unskilfulness on the part of his fellow-servants or employees engaged in the same line of duty, or incident thereto; provided such fellow-servants are competent and skilful to discharge the duty assigned them.

These instructions declare the law correctly, as we have already decided in the case of *Honner v. Ill. Cent. R. R. Co.*, 15 Ill.

550 (1), and are in harmony with the great majority of English and American decisions.

See on the point, Hutchinson, Adm'x, *v.* York, Newcastle & Berwick R'y Co., 5 Exch. 341; Wigmore, Adm'x, *v.* Jay, 5 Exch. 353; Skipp *v.* Eastern Counties R'y Co., 24 Eng. Law & Eq. 396; Wiggett *v.* Fox, 36 Eng. L. & Eq. 486; Degg, Adm'x, *v.* Midland R'y Co., 40 Eng. L. & Eq. 377; Farwell *v.* Boston & Worcester R. R. Co., 4 Metc. (Mass.) 49; Murray *v.* South Carolina R. R. Co., 1 McMullen, 385; Brown *v.* Maxwell, 6 Hill, 592; 6 Barbour, 231; 3 Cush. 270; Ryan *v.* Cumberland Valley R. R. Co., 23 Pa. 384; 7 La Ann. 495; Shields *v.* Yonge, 15 Ga. 349, 14 Am. Neg. Cas. 174, *ante*; Madison & Ind. R. R. Co. *v.* Bacon, 6 Porter (Ind.), 205.

We think the doctrine established by these cases the correct doctrine. It is right and proper that one servant should not recover against the common master for the carelessness of his fellow-servants, provided competent servants have been selected by the master. It is important to all concerned that each servant should have an interest in seeing that all his co-servants do their duty with proper care and fidelity, and who will take care to report the negligent and unskilful servants by whom their lives may be endangered, to their principal. This will make them all prompt and vigilant, and their master's interest be closely interwoven with their own, and all properly regarded. Independent of this, it must be understood that each servant, when he engages in a particular service, calculates the hazards incident to it, and contracts accordingly. This we see every day — dangerous service generally receiving higher compensation than a service unattended with danger or any considerable risk of life or limb.

The jury in this case were fully informed of these principles by the clear and unqualified instructions of the court, and no

1. In HONNER *v.* ILLINOIS CENTRAL R. R. Co., 15 Ill. 550 (1854), it was held that: "The principal is not liable to one servant for the carelessness of another servant, where both are engaged in his business. An action will not lie by a servant against his principal for injuries sustained by the carelessness of his fellow-servants. The doctrine of *respondeat superior* does not extend to the case of an injury received by one servant through the carelessness of another." The action was brought by an employee for injuries sustained by him while using a turn-table, an appliance breaking and striking plaintiff, the accident being caused by act of fellow-servant in not properly securing the turntable fixtures. Judgment for defendant in the Cook Circuit Court affirmed.

duty remained to them but to obey them. They were constrained to believe from the evidence, there being no conflict, that the employees of the company were skilful and competent for the business in which they were employed. There was no "wrongful act, neglect or default" proved of such a character as to have entitled the deceased, had he survived the injury, to maintain an action. The proof abundantly shows that the engine-driver and conductor, who are the principal persons engaged about the train, were skilful and competent men, and that the usual and ordinary caution was observed by them. There can be little doubt, from the evidence, that the accident was occasioned by the unskilful manner in which the wood was loaded upon the cars — in doing which the deceased was an actor — the ends of the sticks extending over the side so far as to strike the train on the switch. By striking this train, the pile of wood near which the deceased was standing was displaced and he precipitated upon the track. This, surely, was but an ordinary accident — a casualty to which the employment he was engaged in exposed him, and he must be understood to have made his contract with reference not to it especially, but to all accidents of such character. Whether he participated or not in the act of piling the wood is immaterial. All the hands hired by Bennett and Scott, who were contractors to furnish the wood, and who had control of the engine and train, were engaged in the same business, and the deceased took upon himself, in consideration of the compensation paid him, the ordinary risks of the business, including the negligence of his fellow-servants. If this were not so, no great enterprises could be safely undertaken and carried on, nor would there exist that vigilance and care on the part of the employed which is so vital to their success. The court, after instructing the jury as it did, should not have hesitated to set aside the verdict, as the verdict was directly in the face of the instructions, and no evidence justifying it.

We have said, and such is the rule everywhere, that a court will not set aside a verdict where the jury have found contrary to the instructions of the court, if upon the whole case it appears that substantial justice has been done. In a case like this, however, where an important principle was involved, and one of no common magnitude, and in expounding which the court was clear and distinct, and no sufficient evidence to charge the defendants, a court would fall far short of its duty should it permit its

instructions to be totally disregarded by the jury, as they appear to have been in this case.

The judgment of the court below is reversed and the cause remanded.

Judgment reversed.

## DAEGLING v. GILMORE.

*Supreme Court, Illinois, September Term, 1868.*

[Reported in 49 Ill. 248.]

**CONTRACTOR NOT LIABLE FOR ACTS OF EITHER ARCHITECT OR OWNER OF BUILDING.** — A contractor employed to do the brick work upon a building, under the plans and direction of an architect, as an agent of the owner, cannot be held liable for the acts either of the architect or the owner.

**LIABILITY OF CONTRACTOR.** — In such case, the contractor, working under the plans and direction of the architect, only undertakes that his work shall be skilful and workmanlike, and can only be held liable for its sufficiency.

**FALL OF BUILDING — DEFECTIVE PLANS — ARCHITECT — CONTRACTOR NOT LIABLE.** — And if the contractor performs his work with skill and in a workmanlike manner, under the direction of the architect, and in accordance with his plan, he cannot be held answerable in damages for an accident which occurs from the falling of the building, where such accident was the result of a defect in the plan of the architect not known to the contractor (1).

(*Syllabus to the official report.*)

i. As to liability of contractors and owners of buildings for injuries to employees and third persons, and the application of the rule of *respondeat superior*, see the following cases:

*Falling from defective ladder — Owner of building not liable.* — In *MERCER v. JACKSON*, 54 Ill. 397 (1870), an action to recover damages for fatal injuries to plaintiff's son, Mercer, while working on defendant's building, judgment for defendant on demurrer to declaration was affirmed, the facts appearing in the syllabus to the official report as follows:

"The owner of a building employed a carpenter to do carpenter work and a mason to do mason work thereon, and while one of the men employed by the mason, in the performance of his duties

in the line of his employment, was ascending a ladder which had been erected by the carpenter, the ladder gave way by reason of its defective construction, and the man fell to the ground, receiving injuries from which he died. Held, in an action against the owner, by the father of the person injured, to recover damages for his death, alleged to have been occasioned by the negligence of the carpenter in the construction of the ladder, there was no cause of action shown, it not appearing it was the duty of the carpenter, in the course of his employment as such, to build this ladder for the masons to use, or that he was specifically employed by the owner to build it.

"Although the carpenter may have

APPEAL from judgment for plaintiff for \$3,031 in the Superior Court of Chicago. The facts appear in the opinion. *Judgment reversed.*

HERVEY, ANTHONY & GALT, for appellant.

GARRISON & BLANCHARD, for appellee.

**Walker, J.** — This was an action on the case, brought by appellee, in the Superior Court of Chicago, against appellant, who was employed by one Schwartz, to erect the walls of a brick building, near the premises of appellee. There was a contract to perform the wood work, and another to do the gas work and plumbing. It was all to be done according to plans and specifications furnished by one Bauer, an architect, and who was, under the agreement of the parties, the superintendent of the work. The building, while in the process of erection, and before it was roofed, was blown down, and fell upon appellee's house and crushed it, destroying his household property, killing his wife and child, and injuring himself and niece, and he claims that he lost a considerable sum in money and government bonds. For these injuries he claims the right to recover damages in this

made the ladder 'for the purpose of enabling all the men working on the building to climb up to the different parts thereof,' still, it not appearing it was any part of his employment as a carpenter, to make ladders for anybody but himself, the owner could not be held liable for injury resulting to the masons for their defective construction. If the mason chose to employ the carpenter to make ladders for him, or to use those made by the carpenter for the common use of all, he should look to the carpenter for damages from defects, not to the owner of the building."

\* \* \*

*Fall of wall of building — Owner not liable for negligence of contractor.* — In **HALE ET AL. v. JOHNSON**, 80 Ill. 185 (1875), judgment for plaintiff (Johnson) in the Circuit Court of Cook county was reversed. The declaration alleged that Rowe (one of the defendants) was erecting a building upon certain premises which he owned; that he employed Hale and Moss (the other defendants) as his contractors and servants in such

erection; that Hale and Moss employed Johnson (the plaintiff) as a day-laborer and servant upon the building, and that he was working there under their direction and control; that while he was so engaged, there was an unsafe wall on the premises liable to fall; that this was known to each of the defendants but not to plaintiff; that Hale and Moss, with the consent of Rowe, ordered plaintiff to excavate near this wall; that while he was so laboring, through the negligence of defendants and without any negligence on his part, the wall fell upon him and crushed his arm, which had to be amputated. The Supreme Court said there was clearly error in rendering judgment against defendant Rowe, and for such error, judgment was reversed. It was held that "while a master is responsible for injuries arising from the negligence of his servant, a party who has contracted for the doing of certain work for his use and benefit is not liable for injuries arising during the performance of such work. One who contracts to do a

action against appellant. A trial was had in the court below, and the jury found a verdict in his favor for \$3,031. A motion for a new trial was entered, which the court overruled and rendered judgment on the verdict. The case is brought to this court on appeal, and a reversal is asked on the grounds of a misdirection of the jury by the court, and because the verdict was against the evidence and the instructions which were given.

It is urged that appellant was not liable for inherent defects in the plan of the building furnished by the architect. In this, as in all other actions, a recovery cannot be had except for some neglect or violation of duty imposed by the law. As a general rule, one person is not responsible for the acts or omissions of another. It is, however, true, that there are certain relations, which, when they exist between parties, render one person liable for the acts or defaults of others, as in case of master and servant, principal and agent, and in some other cases, where the doctrine of *respondeat superior* is applied. But in this case none of these relations appear to have existed. Appellant was the specific piece of work, furnishing his liable for damages caused by the assistants and executing the work tractors' negligence.

either entirely in accord with his own ideas, or in accordance with a plan previously given to him by the person for whom the work is done without being subject to the orders of the latter in respect to the details of the work, is clearly a contractor, and not a servant."

See also *KEPPERLY v. RAMSDEN*, 83 Ill. 354 (1876), person falling into excavation being made in front of defendant's premises, where it was held that the owner was not liable for the negligence of the contractor.

*Application of the rule of respondeat superior to municipal corporations.* — In *CITY OF CHICAGO v. JONEY*, 60 Ill. 383 (1871), the doctrine of *respondeat superior*, was applied, in an action against the city for damages to plaintiff's canal boat caused by an obstruction in the canal whereby the boat was sunk. It was held that where the city contracted with certain parties for the deepening of the Illinois and Michigan canal, under the supervision of its own engineer, and subject to his orders, the city was

*CITY OF CHICAGO v. DERMODY*, 61 Ill. 431 (1871), person injured by fall of roof of the City Hall in process of completion, was decided on the authority of *City of Chicago v. Joney*, 60 Ill. 383 (preceding paragraph), the contractors being the servants of the city and the doctrine of *respondeat superior* applied.

*Owner not liable for negligence of contractor.* — In *SCAMMON v. CITY OF CHICAGO*, 25 Ill. 424 (1861), it was held that "an owner of land who contracts with a skilful party to erect a building thereon, and who for that purpose surrenders the premises for the uses of the contractor, is not, during the erection of the building, answerable in damages for an accident which occurs to a stranger passing by. If the sufferer has any recourse, it is against the contractor, or the corporation within which the property is situate. The parties who may be accused of negligence under such circumstances, are not the servants of the owner of the premises, but of the contractor."

contractor to perform the work, under the direction of the architect as the agent of the owner of the lot; and hence, appellant cannot, by any known rule of law, be rendered liable for the acts of either the architect or the owner.

Appellant had no right or power to control the acts of either, and to hold him liable for them would be to reverse the rule and require the inferior to answer for the acts of the superior, or his principal — to render the servant liable for the acts of his master, and the agent for those of his principal.

A builder, working under the plan and direction of an architect, does not hold himself out as a scientific architect. He only holds himself out as a skilful and competent workman, capable of fully carrying into effect the plans of the architect. He neither directly nor indirectly endorses or insures the sufficiency of the architect's plans. He does not devise them, endorse them, or undertake for their sufficiency. He only undertakes that his work shall be skilful and workmanlike. And if he fails in this, he must answer in damages for the loss that is thus produced. If, then, this building fell, as the result of negligence, incompetency or want of skill in the manner in which the work was performed by appellant, he would be liable for the damages which ensued. But if he performed his part of the work with skill, and in a workmanlike manner, under the direction of the architect, and on his plan, and that plan was defective, he would not be liable. He, in the performance of his part of the work, must be responsible for the skill and fidelity of the workmen he employs in its execution, as well as all persons under his control, but not for the acts of those under whom he acts, or for others acting independently of them. Hence, if it appeared that the negligent or unskilful manner of performing the carpenter's work, by the contractor, was the cause of the fall of the building, appellant would not be liable for the damages it produced. A case might occur where a plan was so defective that a person unskilled in the principles of architecture would know that it was unsafe, in which case a contractor, working under such a plan, furnished by an architect, would be liable; but ordinarily such is not the case, unless it could be shown that the contractor knew the plan was defective, as in such a case he has no right, knowingly to endanger the community.

Several of the instructions given for appellee, contravene the views here expressed, and they, no doubt, misled the jury in

arriving at their verdict, and they were, to that extent, erroneous, and the judgment of the court below must be reversed and the cause remanded for a new trial.

Judgment reversed.

**Liability of master for negligent act of servant resulting in injury to third persons.**

*Collision between vehicle and horse on highway — Liability of master for negligent driving of servant.*

In *TULLER v. VOCHT*, 13 Ill. 277 (1851), an action against Tuller and another for injuries sustained by plaintiff while riding a horse on the highway, caused by negligent driving of defendant's servant, whereby he collided with plaintiff's horse, judgment for plaintiff for \$1,000 was *reversed*, the declaration being fatally defective in not averring that defendant's carriage was for the conveyance of passengers, as provided for by R. S., chapter 93, section 6. The statute makes the owner of such a conveyance liable in trespass for injuries occasioned by the wilful misconduct of the driver. At common law, a master is not liable for the wilful trespasses of his servant, which are not committed in furtherance of the business of the master.

*Collision between vehicles on highway.*

In *COURSEN v. ELY*, 37 Ill. 338 (1865), it was held that in an action brought by the owner of one vehicle against the owner of another, for damages resulting from a collision, caused by negligent driving of the latter's servant, if the defendant has been guilty of negligence, and the plaintiff has shown all the care and skill which can be expected from men of ordinary prudence in like circumstances, he is entitled to recover. Judgment for plaintiff (Ely) for \$250 *affirmed*.

In *CHRISTIAN v. IRWIN*, 125 Ill. 619 (1888), it was held (as per syllabus to the official report) that "where the plaintiff has been injured by the gross misconduct of the defendant's servant while engaged in the service of his principal in driving a wagon and team along the street, in driving into and colliding with the wagon and team of plaintiff passing along the highway, and plaintiff, at the time of the injury, was observing due care for his personal safety, the master will be liable for the injury." Judgment for plaintiff for \$2,500 *affirmed*.

See also *ANDREWS v. BORDECKER*, ADM'X, 126 Ill. 605 (1888), where a master was held liable for the negligence of a servant resulting in injury to third person, under the rule of *respondeat superior*.

*BERNSTEIN v. ROTH*, 145 Ill. 189 (1893), was an action to recover damages for personal injuries to plaintiff while riding in his carriage, it being alleged that a wagon belonging to defendant was so carelessly driven by his servant that "the shaft of the said wagon of defendant" struck plaintiff's carriage thereby throwing plaintiff upon the ground with such violence as to seriously injure him. There were two trials in the Superior Court of Cook county, the first resulting in a verdict for plaintiff for \$4,500, which was set aside, and the second giving verdict for \$2,500 on which judgment was entered, and defendant appealed to the Appellate Court for the First District which affirmed the judgment. An appeal was taken to the Supreme Court and the judgment below was *affirmed*. The Supreme Court (per WILKIN, J.) said: "The only ground

of reversal urged by counsel for appellant is that the evidence fails to establish the fact that the driver of the wagon which collided with the appellee's carriage was the employee of appellant. Unquestionably the law is, as contended by counsel, that a person is not responsible for the wrongful act of another not his agent, servant or employee; but, unfortunately for appellant, he is deprived of all benefit of that principle, by the conclusive finding of the fact that the one guilty of the negligence here complained of was his servant." \* \* \* Other points decided related to questions of practice.

#### **Liability of master for tort of servant.**

In *ARMSTRONG v. COOLEY*, 10 Ill. 509 (1849), it was held that "it is not necessary, in order to maintain an action for damages for the destruction of stacks of grain and hay by reason of a fire set out by defendant, that plaintiff should be the owner of the freehold where the stacks were standing. If a fire be set out in the prairie by a servant under the direction of his master, the latter is responsible for all of the consequences resulting from it, and he cannot shield himself from such responsibility by showing that his instructions were not strictly pursued by his servant in doing the illegal act. Even when the act is legal, he is responsible for the manner of its performance, if done in the course of his employment, and not in wilful violation of his instructions."

See also *JOHNSON v. BARBER*, 10 Ill. 425 (1849), action of trespass for setting fire to prairie, where it was held that "if one person commit an unlawful act under the direction of another, that fact will not shield him from responsibility, but both are equally liable to the injured party."

In *OXFORD v. PETER*, 28 Ill. 434 (1862), it was held that where a servant is directed to drive cattle out of a certain field, and he drives them elsewhere than out of the field, the master is not liable. Judgment for plaintiff for \$20 reversed. Where a master gives general directions to his servant, trusting to the discretion of the latter, he may become liable for his action, but when the directions are specific, and the servant transcends them, the master is not liable. Citing *Johnson v. Barber*, 5 Gilm. 425; *Tuller v. Voght*, 13 Ill. 277.

In *KORAH v. CITY OF OTTAWA*, 32 Ill. 121 (1863), action by city against owner of canal boat for damages to a bridge, it was held that "the fact that the master of a canal boat was not on board the boat at the time an injury to a bridge resulted from the negligence of his crew, who were on board, will not excuse him from liability for their neglect, he being at the time on the towpath and in immediate command of the crew. The crew were his servants, and he must be held responsible for their acts, while in the line of their duty, to the same extent as if he were personally present and directing their acts. The master is always liable for the neglect or wilful acts of his servant, when the latter is in his immediate employment, unless he forbid the act."

#### *Attorney liable for negligence of clerk.*

In *WALKER ET AL. v. STEVENS*, 79 Ill. 193 (1875), it was held that: "Where an attorney at law employs another person to prosecute a claim placed in his hands for collection, he is liable to his client for the negligence of the person so employed by him, and the fact that such person is himself a competent lawyer, does not relieve the attorney employing him from liability to his client on account of such negligence."

**THE INDIANA CAR COMPANY v. PARKER.**

*Supreme Court of Judicature, Indiana, February, 1885.*

[Reported in 100 Ind. 181.]

**MASTER NOT LIABLE FOR NEGLIGENCE OF FELLOW-SERVANT RESULTING IN INJURY TO ANOTHER SERVANT.** — The master is not liable to a servant for injuries resulting from the negligence of a fellow-servant engaged in the same general line of duty, where the negligent act is performed in the capacity of servant.

**FELLOW-SERVANTS.** — Servants engaged in the same general line of duty are fellow-servants although one may be a superior, and the others may be subordinate servants, under his immediate direction and control.

**MASTER LIABLE FOR NEGLIGENCE OF AGENT.** — Where an agent stands in the place of an absent master, the master is liable for his negligence in performing duties which the law requires of the master.

**DUTY OF MASTER — SAFE MACHINERY — AGENT.** — It is the duty of the master to provide safe and suitable appliances for his servants' use, and where he authorizes another to perform this duty he is liable for the negligent performance of the duty by such agent.

**DELEGATION OF DUTY — MASTER LIABLE FOR FAILURE OF AGENT TO PERFORM DUTY.** — The duty of the master to provide safe and suitable machinery and appliances is a continuing one, and he is bound to exercise reasonable and ordinary care in keeping such machinery and appliances in safe condition for use, and he cannot relieve himself of responsibility by delegating this duty to an agent (1).

**REASONABLE CARE REQUIRED OF MASTER — DEFECTIVE ROPE — NOTICE.** — Ordinary care requires that a master shall take notice of the liability of parts of machinery to decay from age or wear out by use, and this applies in the case of a rope attached to machinery.

**FOREIGN CORPORATIONS — APPLICATION OF THE RULE.** — The foregoing rules applied in the case of a non-resident corporation delegating the superintendence of its machinery and management of its business operated in this State.

**EMPLOYEE INJURED BY SAW MACHINE — DEFECTIVE ROPE — NOTICE OF DEFECT BY FOREMAN — LIABILITY OF MASTER.** — Where an employee while operating a circular saw machine in defendant's factory, under the direction of defendant's foreman, who was the agent of defendant, was injured by his hand being caught by the machine, owing to the breaking of a defective rope, which defect was known to the foreman, the defendant was liable for the failure of its agent to perform its duty in exercising reasonable care in furnishing safe machinery and appliances whereby a servant was injured.

1. The rulings in *Indiana Car Co. v. Parker*, 100 Ind. 181, have been followed in numerous subsequent decisions in Indiana in cases involving the liability of a master for injury to a servant, and have been cited and followed in similar cases in other States.

**MEASURE OF DAMAGES.** — In computing damages in such a case it was proper to consider the pain and suffering, the expenses incurred for medical attendance, the character of the injury, whether temporary or permanent, and its effect upon the ability of the person injured to earn money or pursue his trade or profession.

**EXCESSIVE DAMAGES — VERDICT — PRACTICE.** — A verdict will not be disturbed on the ground of excessive damages unless they are such as to induce the court to believe that the jury must have acted from prejudice, partiality or corruption.

**NEGLIGENCE *PER SE.*** — It cannot be said, as a matter of law, that a workman is guilty of negligence who changes from one part of his work to another at the command of the agent, set over him by the master.

**EVIDENCE — EXHIBIT — INJURED HAND.** — It was not material error to allow plaintiff in this case to exhibit, in the course of his testimony, his wounded hand to the jury.

APPEAL from the Henry Circuit Court. The facts are stated in the opinion. *Judgment affirmed.*

W. D. FOULKE, J. L. RUPE, J. H. MELLET and E. H. BUNDY, for appellant.

W. F. MEDSKER, for appellee.

**Elliott, J.** — The complaint of the appellee alleges that he was employed by the appellant; that while engaged in the discharge of the duties of his employment, he received an injury, and that this injury was caused by the fault and negligence of the appellant in providing unsafe and defective machinery.

In a very able and elaborate brief, counsel for appellant argue that the appellee is not entitled to recover because the negligence which caused the injury was that of a fellow-servant, the foreman of the shop in which the appellee was employed; and that for such negligence the employer is not liable.

We concur with counsel in the statement of the general principle, that a foreman is a fellow-servant of those working with him, and that for the foreman's negligence in the discharge of his duties as foreman, the master is not responsible to a fellow-servant. The overwhelming weight of authority sustains this general doctrine, and our own court has been one among its staunchest supporters, as a long line of decisions attest. Ohio, etc., R. Co. v. Tindall, 13 Ind. 366; Wilson v. Madison, etc., R. Co., 18 Ind. 226; Slattery v. Toledo, etc., R. Co., 23 Ind. 81; Ohio, etc., R. Co. v. Hammersley, 28 Ind. 371; Columbus, etc., R'y Co. v. Arnold, 31 Ind. 174; Sullivan v. Toledo, etc., R'y Co., 58 Ind. 26; Gormley v. Ohio, etc., R'y Co., 72 Ind. 31; Robertson v. Terre Haute, etc., R. Co., 78 Ind. 77; Boyce

*v. Fitzpatrick*, 80 Ind. 526; *Drinkout v. Eagle Machine Works*, 90 Ind. 423 (1).

In a recent case *Chicago, M. & St. P. R. Co. v. Ross*, 31 Alb. L. J. 61 [112 U. S. 377], the Supreme Court of the United States, by a divided court, four of the judges dissenting, laid down a somewhat different doctrine, but, as said by a reviewer: "It is probable that a doctrine approved by Chief Justice Shaw and uniformly followed by every State except three or four, will hold its own against a bare majority decision of the Federal court." 31 Alb. L. J. 81 (2).

In *Columbus, etc., R'y Co. v. Arnold*, 31 Ind. 174, the principle was applied to a case where the servant injured was a fireman, on a locomotive, and the person guilty of negligence was a master mechanic. That case is an extreme one, and does, perhaps, carry the doctrine beyond its limits.

In *Robertson v. Terre Haute, etc., R. Co.*, 78 Ind. 77, the servant injured was a brakeman, and the agent guilty of negligence was a train dispatcher; and in *Drinkout v. Eagle Machine Works*, 90 Ind. 423, the servant who received the injury was employed as a laborer in the shop of which the agent, guilty of negligence, was a foreman.

In *Brazil, etc., Coal Co. v. Cain*, 98 Ind. 282, the principle was applied to the case of a "bank boss" in a coal mine, whose duties were the same as those of a foreman. We shall find abundant authority to the same effect outside of our own reports.

In *Wilson v. Merry*, 1 L. R. 1 Sc. & Div. App. 326, it was held by the House of Lords that a servant employed as a miner

1. As the opinion rendered by ELLIOTT, J., in *Indiana Car Co. v. Parker*, 100 Ind. 181 (the case at bar), cites and discusses many of the Indiana cases, it is deemed unnecessary to make extended notes, except in a few instances, of the authorities so quoted, the learned judge having clearly stated the points involved in his able and exhaustive treatment of the law of master and servant. But notes and abstracts of many of the *Indiana* decisions cited in the opinion in the PARKER case will be found appended to cases reported with the Indiana cases elsewhere in this volume of AM. NEG. CAS.

2. But see *New England R. R. Co. v. Conroy*, 175 U. S. 323, 7 Am. Neg. Rep. 182 (1899), where the case of *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377, and subsequent cases in the United States Supreme Court in which the fellow-servant question is involved, are fully discussed and reviewed, and the vagueness and uncertainty theretofore existing in the Federal rule of fellow-servants are cleared, and the ruling in the Ross case is shown to be overruled.

could not recover against the owner of the mine for injuries caused by the negligence of the manager. Decisions involving similar principles will be found in *Brown v. Accrington, etc., Co.*, 3 H. & C. 511; *Wigmore v. Jay*, 5 Exch. 352; *Searle v. Lindsay, L. R.*, 10 Q. B. 62; *Allen v. New Gas Co., L. R.*, 1 Exch. Div. 251 (1).

In *Albro v. Agawam*, 6 Cush. 75, the agent guilty of negligence

1. In *Wilson v. Merry*, L. R. 1 H. L. Sc. 326, 19 L. T. N. S. 30 (H. L. 1868), it appeared that respondents were owners of the Haughhead Coal Pit; Neish was their manager for this pit, and there was also a general manager over all the works named Jack. Neish had charge of sinking the pit and making arrangements under ground for opening a new seam, for which purpose a scaffold was erected. Two days after its erection, appellant's son was engaged by respondents to assist in driving the level. While so employed, he was killed by an explosion of fire damp, the accumulation of which was caused by the obstruction to the ventilation occasioned by the erection of the scaffold. It was admitted that both Neish and Jack were competent persons, selected for their duties with proper care. An action having been brought at the trial, the Lord Ordinary directed the jury that if they were satisfied that the arrangements or system of the ventilation of the pit at the time of the accident had been designed and completed by Neish before the employment of appellant's son, and if the owners had delegated to Neish the whole of their authority in regard to the matter, then that Neish and the deceased did not stand in the relation of fellow-workmen engaged in a common employment, and that the defendants were not on that ground relieved from liability. A verdict was on this given for the plaintiff with damages. A new trial on the ground of misdirection having been granted by the Court of Sessions against the interlocutor of that court, the appeal was brought to the House of Lords, whereupon it was held, confirming the interlocutor, that in the points referred to there had been a misdirection. In *Wilson v. Merry*, L. R. 1 H. L. Sc. 326, 19 L. T. N. S. 30, it was held that the liability or nonliability of a master to his workmen cannot depend upon the question whether the author of the accident is or is not in any technical sense the fellow-workman or collaborateur of the sufferer. The case of the fellow-workman is an example of the rule, not the rule itself; the rule stands on broader grounds. The master is not, and cannot be liable to his servant unless there is negligence on the part of the master in that in which he, the master, has contracted or undertaken with the servant to do. A master does not contract or undertake with his servant to execute in person the works connected with his business. What the master is bound to his servant to do in the event of his not personally superintending the work, is to select proper and competent persons to do so, and to furnish them with adequate materials and resources for the work. When he has done this, he has done all that he is bound to do; and if the persons so selected are guilty of negligence, it is not the negligence of the master; and if an accident occurs to a workman to-day in consequence of the negligence of another workman, skilful and competent, who was formerly, but is no longer, in the service of the master, the master is not liable, though the two workmen cannot technically be described as fellow-workmen.

was the superintendent of a factory, and the servant injured was a person employed in running one of the spinning machines, and it was held that the relation was that of fellow-servants. *Northcoate v. Bachelder*, 111 Mass. 322, and *Zeigler v. Day*, 123 Mass. 152, assert a like doctrine.

In the case of *Hard v. Vermont*, etc., R. Co., 32 Vt. 473, the injured servant was an engineer, and the person guilty of negligence a master mechanic in charge of the locomotives, and it was held that the principal could not be made answerable. *Brown v. Winona*, etc., R. Co., 27 Minn. 162, decides that the relation of fellow-servant exists although one is the overseer or foreman. It is, however, held in Iowa that the fact that the superior agent has charge of the subordinate ones does change the relation from that of fellow-servants, unless the superior has authority to hire and discharge subordinate servants. *Peterson v. Whitebreast*, etc., Co., 50 Iowa, 673.

In *Blake v. Main Central R. Co.*, 70 Me. 70, the remark of the judge in *McAndrew v. Burn*, 39 N. J. L. 115, that "a fellow-servant I take to be any one who serves and is controlled by the same master," was approvingly quoted, and it was held that the principle applied, although one servant was subordinate to the other. The Supreme Court of Pennsylvania has held, in several cases, that the fact that one of the agents was a foreman having control of the other does not change the rule, and that they are, nevertheless, fellow-servants of a common master. *Lehigh Valley Coal Co. v. Jones*, 86 Pa. St. 433; *Delaware, etc., Canal Co. v. Carroll*, 89 Pa. St. 374; *Keystone, etc., Co. v. Newberry*, 96 Pa. St. 246. This is the doctrine of the Court of Appeals of

A master cannot warrant the competency of his servants.

In *Brown v. Accrington Cotton Spinning & Mfg. Co.*, 3 H. & C. 511, employee injured in mill alleged to be caused by negligent construction of building, it was held that defendants were not liable unless personal negligence was proved against them, or a person acting under their orders, in giving directions as to the work of construction or in the employment of an incompetent person to do the work, with knowledge of the latter's incompetency.

In *Wigmore v. Jay*, 5 Exch. 352, it was held that a servant is not in general liable to his servant for damages resulting from the negligence of a fellow-servant, in the course of their common employment. *Aliter*, if in the selection of the servant who caused the injury the master has not taken reasonable care to choose a person of ordinary skill and care, or if the servant injured was not at the time of the injury acting in the service of his master.

See also similar points in *Searle v. Lindsay*, L. R., 10 Q. B. 62, and *Allen v. New Gas Co.*, L. R., 1 Exch. Div. 251.

New York. *Wright v. N. Y. Central R. Co.*, 25 N. Y. 562; *Crispin v. Babbitt*, 81 N. Y. 516.

The cases relied on by the appellant do not conflict with the views expressed in the cases cited by us. *Rogers v. Overton*, 87 Ind. 410, was not an action against the master, but was an action by one fellow-servant against another, and is, of course, not at all in point. *Boyce v. Fitzpatrick*, 80 Ind. 526, affirms, in express terms, the general principle of the cases cited by us, but decides that the master is liable for a negligent failure to provide safe machinery. *Indiana Mfg. Co. v. Millican*, 87 Ind. 87, belongs to a class of cases essentially different from the present, for it decides, what is not here immediately involved, that a master is responsible if he negligently employs an incompetent servant, and thus causes injury to another servant. The decision in *Mitchell v. Robinson*, 80 Ind. 281, directly affirms the general doctrine as we have stated it in the early part of this opinion, but declares that where the agent stands in the place of an absent master, the master is liable for his negligence in performing duties which the law requires of the master. There is, therefore, no conflict in our cases, and they have a full and firm support from the decisions of other courts.

The rules which these decisions so firmly establish as the law of this State may be thus stated:

*First.* The master is not liable to a servant for injuries resulting from the negligence of a fellow-servant engaged in the same general line of duty, where the negligent act is performed in the capacity of servant.

*Second.* Servants engaged in the same general line of duty are fellow-servants although one may be a superior, and the others may be subordinate servants, under his immediate direction and control.

The facts which it is necessary to consider in connection with the rules of law stated are these: The appellant is a foreign corporation with its chief officers and agents in another State; it owned and operated a car manufactory at Cambridge City, in this State; this factory was under the general control and management of John McCrie; the woodshop in which the appellee was injured, and where he was employed, was under the immediate control of John Higginson, as foreman.

It is obvious that the rules of law will preclude the appellee from recovering upon the ground that the foreman, in the

discharge of his duties as foreman, was guilty of negligence. While Higginson was acting merely as foreman, and not discharging a duty owing by the master to its servants, he was the fellow-servant of the appellee. The duties of his position as foreman did not make him anything more than a co-employee, with a higher rank and greater authority than the appellee, and so long as he kept within the line of his duties as foreman, he was a fellow-servant, serving a common master. If the negligence which caused the injury occurred while Higginson was engaged in the performance of the duties imposed upon him as an employee in the same general line of service with the appellee, the employer is not liable, because the liability to injury from the negligence of a fellow-servant is one of the risks of the service which the servant assumes in entering upon it. The servant does not assume any risk arising from a breach of duty by the master, but does assume the risk of a breach of duty by his co-servants. It is clear that counsel's theory, that the appellee is entitled to recover on the ground that the foreman was guilty of negligence in the performance of his duty as foreman, cannot be maintained, and if there is no other ground upon which the appellee can plant his right to a recovery, this appeal must be sustained.

It is the duty of the master to provide suitable and safe machinery, reasonably well adapted to perform the work to which it is devoted, without endangering the lives or limbs of those employed to operate it. The master is not bound to use the highest care, nor to secure the latest and most improved machinery, but he is bound to use care, skill and prudence in selecting and maintaining machinery and appliances, and for a negligent omission of this duty he is answerable to a servant injured by the omission. *Umback v. Lake Shore, etc., R'y Co.*, 83 Ind. 191, 193; *Boyce v. Fitzpatrick*, 80 Ind. 526; *Lake Shore, etc., R'y Co. v. McCormick*, 74 Ind. 440; *Lawless v. Conn. River R. Co.*, 136 Mass. 1; *Trask v. Cal., etc., R. Co.*, 63 Cal. 96; *Payne v. Reese*, 100 Pa. St. 301; *Hough v. R'y Co.*, 100 U. S. 213; *R. R. Co. v. Fort*, 17 Wall. 553; *Ford v. Fitchburg R. Co.*, 110 Mass. 241; *Paterson v. Wallace*, 1 Macq. 748; *Corcoran v. Holbrook*, 59 N. Y. 517; *Ellis v. N. Y., etc., R. Co.*, 95 N. Y. 546; *Wilson v. Willimantic Linen Co.*, 50 Conn. 433, 13 Am. Neg. Cas. 677; *Vosburg v. Lake Shore, etc., R'y Co.*, 94 N. Y. 374; *Wood, Master and Servant*, 686; 2 Thomp. Negl. 972; *Wharton, Negl.*, § 211.

The duty which the master owes to the servant is one which he cannot rid himself of by casting it upon an agent, officer or servant employed by him. The distinction between a negligent performance of duty by an agent or servant, and the negligent omission of duty by the master himself, is an important one. Where the duty is one owing by the master, and he entrusts its performance to an agent, the agent's negligence is that of the master. As the master is charged with the imperative duty of providing safe and suitable appliances, this duty he must perform, and if he entrusts it to an agent, and the agent performs it in his place, the agent's act is that of the master. In authorizing an agent to perform such an act, the principal is, in legal contemplation, himself acting when the agent acts, for he who acts by an agent acts by himself. This principle does not conflict with any of the general rules we have stated, for the agent assumes, by authority, the master's place, and does what the law commands the master to do. He is for the occasion, and in the eyes of the law, the master. If it be true that the agent's act is the master's act, then it must be true that the negligence involved in the act is that of the master himself. The rule which absolves the master from liability for the negligence of the fellow-servant has no application whatever where the agent stands in the master's place. The reason of the rule fails, and where the reason fails, so does the rule itself. The reasons which support the rule are that servants take the risks of the employment upon which they enter, and that the public policy requires that fellow-servants should "each be an observer of the conduct of the other." *Farwell v. Boston, etc., R. Co.*, 4 Metc. (Mass.) 49.

The first of these reasons completely fails when it is brought to mind that the servant does not assume the risk arising from unsafe and unsuitable machinery and appliances. The second as surely and completely fails when we affirm, as under all the authorities affirm we must, that the duty to provide safe appliances rests upon the master, and not on any servant, for, surely, servants are not bound to be observers of the master's conduct. It is, therefore, not at all difficult to clearly discriminate and broadly mark the difference between a case where it is the master's duty, as master, that is neglected, and a case where it is the fellow-servant's duty, as servant, that it is negligently performed. A servant has a right, himself exercising ordinary care, to rely upon his master's care and diligence. He is not bound

to watch his master as he is his fellow-servant. The rights are reciprocal, the master has his duty as the servant has his. When the master's duty is negligently done, he it is who is guilty of a breach of duty although he acted through the medium of an agent. If the master were permitted to escape his duty by shifting it to an agent, the practical result would be his entire absolution from the duty which the law imposes. The law will not permit this result, for it will not permit a duty to be evaded, but will require performance by the person upon whom it has fixed it. A different rule from that stated would, in such a case as this, wholly relieve the master from obligation to his servants, for here the foreign corporation acted by its agents, and none of its chief officers were ever at the factory in Cambridge city. If it cannot be held responsible for the negligence of these agents in selecting, arranging and maintaining this machinery, the result will be that it is wholly absolved from its duty to its agents and servants.

It is clear upon principle that where the duty rests directly on the master, and he authorizes an agent or servant to perform that duty, he is bound to answer to a servant injured by the negligent performance of the duty, nor are authorities wanting. In one of our text-books it is said: "It is important at this point to remember that the master is liable where the negligence of the offending servant was as to a duty assumed by the master as to working place and machinery. A master, as we have already seen, is bound when employing a servant to provide for the servant a safe working place and machinery. It may be that the persons by whom out-buildings and machinery are constructed are servants of the common master, but this does not relieve him from his obligation to make buildings and machinery adequate for working use. Were it otherwise, the duty before us, one of the most important owed by capital to labor, could be evaded by the capitalist employing only his own servants in the constructing of his buildings and machinery." Wharton, Negl., § 232.

In a thoughtful essay upon this general subject, Judge Cooley says: "We have seen that in some cases the master is charged with a duty to those serving him which he cannot divest himself of by delegation to others. He is charged with such a duty as regards the safety of his premises, the suitableness of the tools, implements, machinery or materials he procures or employs,

and the servants he engages or makes use of. Whoever is permitted to exercise the master's authority in respect to these matters is charged with the master's duty, and the latter is responsible for the want of proper caution on the part of the agent, as for his own personal negligence." 2 Southern Law Rev., N. S. 114, 123.

In *Mullan v. Phila., etc., Co.*, 78 Pa. St. 25, the court said: "In this case there was some evidence that the entire duty of providing the appliances for loading and unloading the vessels of the defendants, had been entrusted to the discretion of Corcoran. And just to the extent to which the proof went in fixing upon him the responsibility for the selection of the rigging and for adjusting and working it, did the same proof tend to establish the fact contended for by the plaintiff, that Corcoran was clothed, as to these duties, with the ultimate power and authority of the defendants." It was held in the case of *Gunter v. Graniteville Mfg. Co.*, 18 S. C. 262, that where a superintendent was employed to secure and keep the machinery of a factory in repair, and by his negligence in the performance of that duty caused an injury to the servant in the same general line of employment, the master was responsible. The court said: "So, too, it is conceded to be the duty of the master to provide suitable machinery for the use of his operatives; and if he delegates this duty to another, he is responsible to his servant for any injury caused by the negligence of any person to whom the performance of this duty has been entrusted." In *Crispin v. Babbitt*, 81 N. Y. 516, the court stated the general principle, that "the liability of the master does not depend upon the grade or rank of the employee whose negligence causes the injury," and then proceeded thus: "On the same principle, however low the grade or rank of the employee, the master is liable for injuries caused by him to another servant, if they result from the omission of some duty of the master, which he has confided to such inferior employee. On this principle, *Flike v. Boston, etc., R. Co.* 53 N. Y. 549, was decided. Church, Ch. J., says, at p. 553: 'The true rule, I apprehend, is to hold the corporation liable for negligence or want of proper care in respect to such acts and duties as it is required to perform and discharge as master or principal, without regard to the rank or title of the agent entrusted with their performance. As to such acts, the agent occupies the place of the corporation, and the latter should be deemed present, and

consequently liable for the manner in which they are performed.' " In *McCosker v. Long Island R. Co.*, 84 N. Y. 77, the same principle is recognized and enforced. The rule is thus expressed by another court: "The duties are the duties of the master, and he cannot evade the responsibilities which are incident and cling to them by delegation to another. When the master appoints some other person to perform these duties, then the appointee represents the master, and though in their performance he may be and is a servant to the master, yet in those respects he is not a co-servant, a co-laborer, a co-employee, in the common acceptation of those terms." *Brothers v. Cartter*, 52 Mo. 372. In another case it was said: "As to the acts which a master or principal is bound as such to perform toward his employees, if he delegates the performance of them to an agent, the agent occupies the place of the master, and the latter is deemed present, and liable for the manner in which they are performed." *Corcoran v. Holbrook*, 59 N. Y. 517.

Speaking of the duty of the master to the servant, the Supreme Court of the United States said: "Its duty in that respect to its employees is discharged when, but only when, its agents whose business it is to supply such instrumentalities exercise due care as well in their purchase originally, as in keeping and maintaining them in such condition as to be reasonably and adequately safe for use by employees." *Hough v. R'y Co.*, 100 U. S. 213, 218; *Wabash, etc., R'y Co. v. McDaniels*, 107 U. S. 454.

One of the first of the American courts to adopt and develop the doctrine that a master is not liable to a servant for the negligence of a fellow-servant, and a court that has with as much sternness as any in the land enforced the doctrine, says: "The agents who are charged with the duty of supplying safe machinery are not, in the true sense of the rule relied on, to be regarded as fellow-servants of those who are engaged in operating it. They are charged with the master's duty to his servant. They are employed in distinct and independent departments of service, and there is no difficulty in distinguishing them, even when the same person renders service by turns in each, as the convenience of the master may require." *Ford v. Fitchburg R. Co.*, 110 Mass. 240. The general principle, that where the master entrusts to a servant a duty which he himself owes to those employed by him, he is liable for a negligent discharge of that duty, is also

involved, and necessarily decided, in the cases of *Mitchell v. Robinson*, 80 Ind. 281, and *Ohio, etc., R. Co. v. Collarn*, 73 Ind. 261, 273.

The duty of the employer to provide safe machinery and appliances is a continuing one. Thompson says: "But the master does not discharge his duty in this regard by providing proper and safe machinery, or fit servants, in the first instance, and then remaining passive. 'It is a duty to be affirmatively and positively fulfilled and performed.' He must supervise, examine, and test his machines as often as custom and experience require." 2 *Thomp. Negl.* 984. In support of this doctrine the author cites *Warner v. Erie, etc., R'y Co.*, 39 N. Y. 458; *King v. N. Y. Central, etc., R. Co.*, 4 Hun (N. Y.) 769; *Shanny v. Androscoggin Mills*, 66 Me. 420; *Lansing v. N. Y. Central R. Co.*, 49 N. Y. 521; *Snow v. Housatonic R. Co.*, 8 Allen (Mass.) 441; *Lewis v. St. Louis, etc., R. Co.*, 59 Mo. 495; *Chicago, etc., R. Co. v. Swett*, 45 Ill. 197, 14 Am. Neg. Cas. 358, *ante*; *Ill. Cent. R. Co. v. Welch*, 52 Ill. 183, 14 Am. Neg. Cas. 356, *ante*; *Goheen v. Texas, etc., R'y Co.*, 3 Cent. L. J. 382. This is the doctrine of the Supreme Court of the United States, as appears from the decision in *Hough v. R'y Co.*, 100 U. S. 213.

In *Gunter v. Graniteville Mfg. Co.*, 18 S. C. 262, it was said: "It is well settled that it is the duty of the master to provide suitable and safe machinery and appliances for the use of his operatives; and, we think, it is also settled that his duty does not stop there, but that it is likewise his duty to keep such machinery in proper repair and in safe working order, and if these duties, or either of them, are negligently performed, and one of the servants thereby sustains an injury, the master is liable, even though he may have entrusted the performance of such duties to subordinates, by whatever name they may be called." In support of this doctrine the court refers to the cases of *Corcoran v. Holbrook*, 59 N. Y. 517; *Brann v. Chicago, etc., R. Co.*, 53 Iowa, 595; *Fuller v. Jewett*, 80 N. Y. 46. The rule is supported by sound principle. The duty of the master is not at an end when he first equips his factory or mill, but continues as long as there are operatives who are entitled to assume that he will use due care to provide safe machinery and appliances. It would overthrow the rule that the risks which the servant assumes are only such as are incident to the use of machinery selected and

maintained by the master with proper care, to deny the validity of our conclusion.

Ordinary care requires that a master shall take notice of the liability of the parts of the machinery to decay from age, or wear out by use. *City of Indianapolis v. Scott*, 72 Ind. 196; *Board, etc., v. Legg*, 93 Ind. 523; *Board, etc., v. Bacon*, 96 Ind. 31; *Rapho v. Moore*, 68 Pa. St. 404. It certainly needs no argument to prove that a factory owner must know that a rope, or materials of a similar character, will wear out, and that he has no right to assume that wear and use will not weaken or impair them. Ordinary prudence, therefore, requires that he should take notice of the liability of such things to wear out, and make provision for such contingencies. Reason and experience unite in affirming that an owner does not exercise even ordinary care, who gives no attention to the effect upon ropes, belts, timbers or the like, which is produced by the wear of continued use. It would be unreasonable to assert that an owner might entirely disregard the tendency of parts of his machinery to wear out, and intrench himself from liability on the ground that at the outset he had provided safe machinery and appliances.

We have ascertained the general principles which rule such cases as this, and it remains to ascertain whether they were correctly applied to the facts of this case. The appellee, on the morning that he was injured, received an order from Higginson, the foreman under whose immediate control he was, to run what was called the cut-off saw; this saw was a circular one, and worked through a groove in a table. The rope which held the saw back from the table, and in a great measure controlled its operation, broke, and the breaking of this rope caused the injury. The evidence shows that the rope was unsuitable, defective and unsafe, and there is also evidence tending strongly to show that the foreman had notice of its condition prior to the morning the injury occurred. One of the appellee's fingers was cut off, another was badly injured, his thumb was also much injured, his hand was split open to the wrist, his wrist and hand rendered stiff, and its serviceableness much impaired. He was confined to his bed for some time, abscesses formed, several bones were extracted, and he suffered great pain. He expended for medicine and surgical attendance \$144.

The court did not err in instructing the jury that the appellant was responsible for the negligence of an agent appointed by it.

to act in its place in purchasing and maintaining machinery upon which the duties of the appellee required him to work. Nor did the court err in refusing the instructions asked by the appellant, asserting that if the appellant had employed a competent superintendent, it was not liable although the machinery was unsafe. It was the duty of the corporation to provide and maintain, so far at least as ordinary diligence could do, machinery safe and suitable for the purposes for which it was used, and the court was right in instructing the jury to that effect. We do not think the appellant has just reason to complain of the ninth instruction, which informs the jury that if the exercise of ordinary diligence on the part of the defendant would have apprised it of the defective condition of the rope, and it negligently allowed the rope to become worn and insecure, the plaintiff, if free from contributory negligence, would be entitled to recover. This instruction, taken, as it must be, in connection with the others, was at least as favorable to the appellant as it had a right to ask. The doubt is, whether, under the authorities, the master is not held to more than ordinary diligence in such matters; but, however this may be, the least degree of diligence to which he is held by any case is ordinary diligence.

In computing damages in such a case as this, it is proper to consider the pain and suffering endured by the injured person, the expenses incurred for medical attention, the character of the injury, whether temporary or permanent, and its effect upon the ability of the person injured to earn money or pursue his trade or profession. *City of Indianapolis v. Gaston*, 58 Ind. 224; *Wright v. Compton*, 53 Ind. 337; *Cox v. Vanderkleed*, 21 Ind. 164; *Taber v. Hutson*, 5 Ind. 322; *Fisher v. Hamilton*, 49 Ind. 341. In this class of cases, exemplary damages cannot be awarded, but full compensatory damages may be given. It is said in a text-book of excellent repute, that: "In an action for negligent injury to the person of the plaintiff, he may recover the expense of his cure, the value of the time lost by him during his cure, and a fair compensation for the physical and mental suffering caused by the injury, as well as for any permanent reduction of his power to earn money." Shearm. & Redf., Negl., § 606. The court approved an instruction substantially like the one now before us in Pittsburgh, etc., *R'y Co. v. Sponier*, 85 Ind. 165, and in *City of Huntington v. Breen*, 77 Ind. 29. In *City of Indianapolis v. Scott*, 72 Ind. 196, an instruction in

almost the exact language of the one under immediate mention was approved.

We think that the complaint sufficiently shows that the appellee suffered special damages, for it describes the injury and avers that the "plaintiff's right hand has been permanently injured and ruined, and rendered unfit for use and labor."

It is a settled rule of law that courts will not disturb a verdict on the ground of excessive damages unless they are, as said by Chancellor Kent, so "outrageous as to strike every one with the enormity and injustice of them, and so as to induce the court to believe that the jury must have acted from prejudice, partiality or corruption." *Coleman v. Southwick*, 9 Johns. 45. This doctrine has often been enforced by this court. *Ohio, etc., R. Co. v. Collarn*, 73 Ind. 261; *Yater v. Mullen*, 23 Ind. 562; *Alexander v. Thomas*, 25 Ind. 268; *Reeves v. State*, 37 Ind. 441; *Hoagland v. Moore*, 2 Blackf. 167; *Guard v. Risk*, 11 Ind. 156. In a recent text-book a like doctrine is laid down, and many authorities cited. *Hayne New Trials*, § 95.

Judgment affirmed.

ON PETITION FOR A REHEARING [OVERRULED APRIL 28, 1885].

**Elliott, J.** — An able brief has been filed on the petition for rehearing, but the principal questions decided are not again discussed, counsel saying: "The view taken in the opinion, however, has such strong reasons to support it that we shall not ask the court to reconsider it."

Ninety-five reasons were stated in the motion for a new trial, and it is now complained that we did not consider all of the questions presented. We did decide all of the main questions and such as counsel fully argued, but it is perhaps true that we did not expressly decide some minor ones, although those decided really rule the case.

The question upon the evidence as to whether Parker was or was not guilty of contributory negligence was one of fact for the jury, and not of law for the court, and as there was evidence satisfactorily supporting the verdict, we must leave it undisturbed. There are, no doubt, cases where the court will determine the question of contributory negligence, but this is not one of them. Whether Parker could have seen the defect, and whether it was such as ordinary prudence and vigilance would have enabled him to guard against, were questions of fact.

Descriptions of the defect were given by the witnesses, and it is impossible for the court to say, as matter of law, that he could, by exercising ordinary prudence, have seen it and avoided injury. It certainly was not one open to observation, and, besides this, one of the superior agents of the corporation, its chief representative in fact, had ordered him to work upon the machinery, and we cannot perceive any reason for taking the case from the jury. *Baker v. Allegheny Valley R. Co.*, 95 Pa. St. 211. It is quite clear that it would have been error for the trial court to have instructed the jury to find for the appellant, and it follows that this court cannot interfere. *City of Indianapolis v. Gaston*, 58 Ind. 224; *Penn. Co. v. Hensil*, 70 Ind. 569; *Louisville, etc., R'y Co. v. Richardson*, 66 Ind. 46; *City of Washington v. Small*, 86 Ind. 462, 469; *Terre Haute, etc., R. Co. v. Buck*, 96 Ind. 346, 3 Am. Neg. Cas. 148; *Penn. R. Co. v. White*, 88 Pa. St. 327; *Willard v. Pinard*, 44 Vt. 34; *Robson v. Northeastern R'y Co., L. R.*, 10 Q. B. Div. 271 (1); *Curtis v. Detroit, etc., R. Co.*, 27 Wis. 158; *Hutch. Carr.* 615. In such cases as this the question must, under proper instructions, be left to the jury as one of fact.

We recognize and approve the general rule, that a servant who continues in the master's employment with full knowledge of the risk cannot recover for injuries received. *Umback v. Lake Shore, etc., R'y Co.*, 83 Ind. 191; *Lake Shore, etc., R'y Co. v. McCormick*, 74 Ind. 440. But that rule does not apply here. There is no such evidence as warrants the assumption that the appellee knew of the defective condition of the machinery, or that it was such as to subject him to any extraordinary risks. The jury, by their general verdict, and also in answer to interrogatories, explicitly negative the existence of knowledge. It

1. In *Robson v. Northeastern R'y Co., L. R.*, 10 Q. B. 271, it appeared that plaintiff, a female, on trying to alight from plaintiff's train found that the coach in which she had been riding was drawn beyond the end of the station platform. She stood for some time expecting that defendant's servants would come to her assistance, and then, to fear that she would be carried on if she remained, attempted to reach the ground, and while so alighting she slipped, fell and was injured. The court ordered a nonsuit. Held, that the evidence was sufficient for the jury to find a verdict for plaintiff and to find that plaintiff had reasonable ground for believing that defendant expected her to alight where she attempted to do. Held, also, that the jury might properly have found that plaintiff reasonably believed she would be carried on and that this would warrant her in attempting to alight.

would be a palpable violation of long-settled rules to set aside the conclusion of the jury upon the evidence as it comes to us.

A single interrogatory is selected by appellant, and upon that a judgment is demanded. This demand cannot be heeded, for the answer is not such as controls, and it is only where the single answer is of controlling force that the general verdict will be set aside. This has been again and again decided. *Grand Rapids, etc., R. Co. v. McAnnally*, 98 Ind. 412, 417, 418, and cases cited; *Hereth v. Hereth*, 100 Ind. 35. Besides, it has been very frequently decided that answers to interrogatories will not control the general verdict, unless there is an irreconcilable conflict, and here there is no such conflict. But if we are wrong in applying these rules, still the appellant cannot succeed, for all that appears in the answer is that one of the superior agents of the corporation, the one in charge of the shop where appellee worked, had knowledge of the defect, and it is quite clear that his knowledge would not conclude the appellee. *Atlas Engine Works v. Randall*, 100 Ind. 293 (1). Even if Higginson, the foreman, had

1. *Minor employee injured by machinery* is that of the master, and he must respond.  
— *Failure of employee to exercise due care*  
— *Master not liable*. — In *THE ATLAS ENGINE WORKS v. RANDALL*, 100 Ind. 293 (decided at the same term as the case at bar), the rules are stated by MITCHELL, J., as follows:

"One of the well-recognized duties of a master is not to expose an inexperienced servant, at whose hands he requires a dangerous service, to such danger without giving him warning. He must also give him such instruction as will enable him to avoid injury, unless both the danger and the means of avoiding it while he is performing the service required are apparent. These are obligations of the master, and he cannot exempt himself from liability by delegating his power to command the servant to another upon whom the obligation to instruct and caution is also imposed.

"If the agent or servant upon whom the power to command is given exercises the power, and fails to discharge the obligation, to the hurt of the servant who is without fault, the failure

"The master having subjected the servant to the command of another without information or caution with respect to all such obligations as the master owes, the other stands in the master's place, and this is so notwithstanding the two servants are, as regards the common employment, fellow-servants.

"If the master has, by general or special instructions, defined the duty and authority of each with respect to the other, or given instructions covering the subject of their employment, so as to give no authority to the one over the other, or so as to point out the danger of the service and the means of avoiding such danger, the rule can have no application." \* \* \* Citing several authorities, among them being *Indiana Car Co. v. Parker*, 100 Ind. 181 (the case at bar).

The RANDALL case (*Atlas Engine Works v. Randall*, 100 Ind. 293) was an action by a minor employee for injuries sustained in defendant's shop.

been a mere fellow-servant in the same line of employment with Parker, instead of a foreman having full authority over him, it is doubtful whether knowledge on the part of Higginson would have concluded Parker.

We do not think it can be said as a matter of law that a workman is guilty of negligence who changes from one part of his work to another at the command of the agent set over him by the master. *Rogers v. Overton*, 87 Ind. 410. Here there was no change from one shop to another, no change from one branch of business to another, but only a change in the same shop from one piece of machinery to another, and we can perceive no reason for holding the servant guilty of contributory negligence in making such a change pursuant to the orders of his superior. It would be unreasonable to require servants to disobey the orders of a superior agent under such circumstances. A prudent man

The facts are stated in the opinion by justed to it, two cog-wheels indenting into each other, the larger of which MIRCHELL, J., as follows:

"The evidence tended to show that the appellee was within a few days of nineteen years old at the time he engaged in the appellant's service; that he was an intelligent, active young man, having the ordinary experience and development of persons of that age; that he had worked some about a blacksmith shop, at farming and bridge building, but had no particular experience with machinery such as that used in the appellant's shops.

"He was employed by the superintendent of the appellant's boiler department as a helper to one Smith Walker, whose business was to attend to the operation of a certain machine called a 'flange punch,' which was a machine used for drilling or punching holes in boiler iron. The evidence tended to show that he was subject to the direction of Walker, so far as receiving from him instructions as to his duties in connection with the operations of this machine. This machine consisted of a heavy iron frame four or five feet in length, and about twelve or fourteen inches wide, and of suitable height, and had, as part of its gearing, to give motion to the punch which was ad-

justed to it, two cog-wheels indenting into each other, the larger of which was forty-two inches in diameter and the smaller seven inches. These were operated by a belt passing over a pulley connected with the machine, thence passing over a pulley on a line-shaft attached to the building. When in motion, the evidence tended to show that the larger cog-wheel made from forty to fifty revolutions per minute, and the smaller one about two hundred, and that the point of indentation of the two wheels was about nine inches from the top of the frame, and from three to five inches out from the side of the body or frame.

"The plaintiff testified that on the fifth day after he entered the defendant's service, he was directed by Walker to procure some 'waste' from the tool-room, and, during the temporary absence of Walker from the machine, wipe off the top of the frame, while the wheels were in motion. He also testified that he was not cautioned by Walker, or anyone else, concerning the danger of getting his hands or person into the cog-wheels, and that he had no directions how to prevent his hands from becoming involved in these wheels while wiping off the top of the frame.

has a right, within reasonable limits, to rely upon the ability and skill of the agent in whose charge the common master has placed him, and is not bound, at his peril, to set his own judgment above that of his superior. *Atlas Engine Works v. Randall*, 100 Ind. 293; *Rogers v. Overton*, 87 Ind. 410. There may, perhaps, be cases where it would be contributory negligence to change positions, as, for instance, where the change is made to a branch of business with which the servant is unacquainted; but this is not such a case, for here the superior agent had authority to give orders, had charge of the branch of business in which the servant was employed, and the change did not take the servant out of the line of his employment. *Dowling v. Allen*, 74 Mo. 13; *Cone v. Delaware, etc., R. Co.*, 81 N. Y. 206; *Cowles v. Richmond, etc., R. Co.*, 84 N. C. 309; *Ryan v. Bagaley*, 50 Mich. 179; *Corcoran v. Holbrook*, 59 N. Y. 517; *Luebke v. Chicago, etc., R'y Co.*, 59 Wis. 127; *Mfg. Co. v. Morrissey*, 40 Ohio St. 148.

On the other hand, Walker testified that he was temporarily called away from his post by the superintendent; that he gave the appellee no directions to wipe off the machine at all; that there was no particular necessity for wiping it off at that time; and that he had on several occasions before that cautioned him not to get his hands in the cog-wheels, and not to go too close to the wheels.

"While engaged in wiping off the top of the frame of this machine, the appellee's hand was caught between the cog-wheels, and was so crushed and lacerated that the loss of all, save the thumb and one finger, resulted.

"It was shown that after the injury the cog-wheels were covered, or 'boxed,' as it is termed, and that the danger in leaving the wheels exposed was not so much to persons at work with or about the machine as to persons passing by it.

"The injury appears to have occurred in this way: While the appellee was wiping off the top of the machine, instead of holding the 'waste' compactly in his hand, he allowed shreds or ends of it to dangle below his hand, and the

ends so hanging down becoming involved in the cog-wheels, his hand was drawn into the wheels and injured as described.

"There was a general verdict for the plaintiff below, and with the general verdict the jury returned answers to special interrogatories.

"By these answers the jury returned that the plaintiff and Smith Walker were co-employees and that he was a young man about nineteen years old at the time of the injury, of average intelligence and capacity, and that the danger from the cog-wheels was apparent to any person of ordinary intelligence and capacity.

"Over motions for a new trial, and for judgment on the special findings of the jury, the plaintiff had judgment." \* \* \*

After stating the duties arising out of the relationship of master and servant the court said:

"As applicable to the facts and circumstances developed in this case, two things were material to be proved in order to fix the liability of the appellant: 1. That the danger to which the appellee was exposed, and which was

In the course of his testimony, and in explaining the character of his injury, the appellee exhibited his injured hand to the jury. There was no substantial error in permitting this to be done. Wharton says: "Injury to the person may also be proved by inspection. Thus in an action to recover damages for an injury to a limb, the injured limb may be exhibited on trial." Wharton Crim. Ev., § 312. A great number of interesting cases are collected by him, all holding such evidence admissible. One among the most remarkable and amusing cases of this general character is that of *Thurman v. Bertram*, 20 Alb. L. J. 151, where a baby elephant was brought into one of the English courts. In his work on Trial Evidence, p. 599, Abbott says: "The injured member may be exhibited to the jury." An

the proximate cause of the injury, was one which was known, or might reasonably have been apprehended, by the appellant. 2. That such danger was one which, by the exercise of the faculties of the appellee, when directed to the thing he was commanded to do, was not open to his observation and apprehension, assuming that he was giving care and attention to the work required of him. Upon both of these propositions we think the proof falls short of making out the case.

"The proximate cause of the injury grew out of the fact that the appellee, in wiping off the top of the machine, needlessly held the waste in his hand in such manner as to permit the ends or parts of it to hang down about nine inches below, and from three to five inches out from the top line of the frame, and by that means to become involved in the revolving cog-wheels. Conceding that Walker directed him to wipe off the machine with waste, and that he gave him no caution, about which there is serious dispute, yet he could not know or reasonably apprehend that he would do it in the manner described. The act of the appellee in permitting the substance employed in wiping the machine to hang down in the manner stated, presumably under his immediate observation, was a thing,

under the circumstances, so highly improper and unnecessary in any possible contingency, that the foreman could not reasonably have anticipated that it might occur. A reasonably prudent and cautious foreman might well believe that the work could be safely done, if done in a manner which the appearances and exigencies of the situation itself would suggest to a person nineteen years old, and he had a right to rely upon the fact that what he directed to be done would be done with due regard to all the hazards which were open to the perception, and which must lie immediately under the eyesight of the appellee, if he was giving attention to the very thing which he was directed to do. Ordinary, usual or probable consequences resulting from attentive application to the service demanded the foreman was bound to anticipate and caution against, but he was not bound to anticipate extraordinary, unusual and improbable occurrences which involved inattention on the part of the appellee. And so as to the other requisite to the appellant's liability, it seems clear to us, upon the appellee's own statement, that if he had been giving attention to what he was doing, the injury would not have occurred." \* \* \* *Judgment reversed.*

English author says that evidence afforded by inspection is of the highest character. 1 Taylor Ev. 513. By another English writer the same view is taken. Best Princ. Ev. 199. There has been much discussion as to whether a person accused of crime can be compelled to submit his person to the inspection of the jury, but it is agreed on all hands that instruments with which a crime was committed, the clothing of the accused or of the deceased, wounds and marks on their person, may be given in evidence. 15 Central L. J. 2 and 209; 22 Albany L. J. 145; Rogers Exp. Test. 104.

Our own decisions have, in a great variety of cases, recognized the right to submit to the jury persons and things for inspection. Fleming *v.* State, 11 Ind. 234; Story *v.* State, 99 Ind. 413; Short *v.* State, 63 Ind. 376; McDonel *v.* State, 90 Ind. 320, 328; Beavers *v.* State, 58 Ind. 530. Perhaps the most numerous class of cases in which the right of the jury to inspect a thing has been discussed is that in which the genuineness of written instruments has been involved, and it has been uniformly held that it is competent for the jury to make such inspections, and that they may be aided by magnifying glasses. Lawson Exp. and Opinion Ev. 415.

The case of Stevenson *v.* State, 28 Ind. 272, does not touch the question here involved as is evident from the statement of the court, for that statement shows that no evidence at all was offered, the trial judge holding that as the defendant was in court there was no necessity for any evidence, as he could determine the defendant's age from his appearance. The case of Ihinger *v.* State, 53 Ind. 251, decides that an instruction given by the court was erroneous for the reason that it made the case turn entirely upon the personal appearance of the party rather than upon the testimony of the witnesses. The decision in Robinius *v.* State, 63 Ind. 235, does go farther and holds that the court trying the case has no right to take into account the personal appearance of the accused in determining the question of his age. Conceding the correctness of this decision, although it has been strongly assailed as requiring a judge to disregard the evidence of his own senses, still there is a distinction between such a case and the present, for where age is the material question, as it was in the case cited, the decision upon inspection really determines the whole case; while, in such a case as the present, the inspection of the wounded member simply illustrates

and makes clear the testimony of the party and assists in determining the character of one of the facts in the case. There is still another distinguishing feature, and that is this, in the present case the question is not as to the effect of the exhibition of the wounded hand; while in the case cited the question was entirely as to the force and effect of the inspection of the person of the accused.

All that we are now required to decide is, whether it was substantial error to allow the appellee to exhibit to the jury in the course of his testimony his wounded hand; we are not required to determine whether the result of such an exhibition can be deemed evidence in the strict sense of the term, or what force and effect should be ascribed to it, if regarded as evidence.

Petition overruled.

#### Notes of cases relating to injuries caused by machinery.

*Employee injured by breaking of saw machine — Flying object — Changing position with another employee — Contributory negligence.*

In *BROWN v. BYROADS*, 47 Ind. 435 (November Term, 1874), where an employee engaged as a catcher in defendant's stave factory, whose duty it was to catch the staves as they were cut, a position of little or no danger, exchanged places with another employee, a sawyer, whose position was one of much greater danger, and while performing the duties of such sawyer the wheel of the saw machine broke and one of the pieces hit and injured the plaintiff, it was held that the plaintiff, by exchanging positions with another employee, contributed to his injury, and judgment for plaintiff in the Boone Circuit Court was reversed.

*Employee injured by machinery — When master liable for negligence of fellow-servant.*

In *BOYCE v. FITZPATRICK*, 80 Ind. 526 (November Term, 1881), where plaintiff, an employee in defendant's factory, was injured while working at a flax-brake, under directions of defendant's superintendent, the negligence charged being negligence in not having proper safeguards to the machinery and recklessness of superintendent in passing straw to the flax-brake whereby plaintiff was thrown violently upon the brake and his arm caught in the machinery and had to be amputated, judgment for plaintiff in the Delaware Circuit Court for \$500 was affirmed, and petition for rehearing overruled. A master is liable for injuries resulting to his servant from defective machinery, although the negligence of a fellow-servant contributed to the accident. (Citing *Cayzer v. Taylor*, 10 Gray, 274; *Mitchell v. Robinson*, 80 Ind. 281.) An employer is not liable to one of his servants for the negligence of a fellow-servant engaged in the same general undertaking, unless the employer has been guilty of negligence in the selection of an incompetent servant, by reason of whose unfitness the injury has occurred. (Citing *Ohio, etc., R'y Co. v. Collarn*, 73 Ind. 261.) The Indiana cases cited in the foregoing case are reported in this volume of AM. NEG. CAS. post.

*Employee operating machinery in cement mill.*

In *GHEENS v. GOLDEN*, 90 Ind. 427 (May Term, 1883), employee injured while operating machinery in defendant's cement mill, judgment for plaintiff in the Clark Circuit Court was affirmed.

*Employee injured by machinery shaft — Incompetent servant.*

In *NORDYKE & MARMON COMPANY v. VAN SANT*, 99 Ind. 188 (November Term, 1884), employee, assisting to move shaft from machinery, injured by shaft falling and breaking his arm, caused by alleged negligence of incompetent servant, judgment for plaintiff in the Superior Court of Marion county for \$800 was affirmed and petition for rehearing overruled.

*Employee unloading wagon injured by projecting bolts of machinery — Dangerous position — Erroneous instruction.*

In *HAWKINS v. JOHNSON ET AL.*, 105 Ind. 29 (November Term, 1885), employee injured in defendant's stave factory, judgment for defendant in the Marion Circuit Court was reversed for erroneous instruction charging that if there were two courses, the master had the right to expect that the employee would take the non-hazardous one, and that if he voluntarily chose the dangerous course he contributed to his own injury, as such charge invaded the province of the jury. The facts are stated in the first paragraph to the syllabus of the official report as follows: "One who, while employed to haul stave-bolts to a factory and to unload them at a certain place, to reach which it is necessary to pass through a narrow way under a revolving shaft, which, without his knowledge, had been broken and repaired with projecting bolts after his last previous load had been delivered, and the wagon-way so raised that he could not sit on the load and drive under the shaft as he formerly had done without danger, is directed by his employer's foreman to drive under the shaft, then in motion, and unload his wagon at the usual place, and, in attempting to do so, and in ignorance of the danger until it is too late to avert it, is caught by the projecting bolts and injured, the employer is liable, unless, by the exercise of reasonable care, the employee could have discovered and avoided the danger."

*Employee struck by revolving saw — Defective rope.*

In *HELTONVILLE MFG. CO. ET AL. v. FIELDS*, 138 Ind. 58 (November Term, 1893), employee, in defendant's lumber mill, struck and injured by a revolving saw, caused by the breaking of a defective rope, judgment for plaintiff in the Lawrence Circuit Court was affirmed.

*Employee hit by flying object from circular saw.*

*BECKER ET AL. v. BAUMGARTNER*, 5 Ind. App. 576 (November Term, 1892), employee, using a stick in shifting the belting to a circular-saw machine, injured by the stick being caught and a piece of it striking him in the eye; judgment for plaintiff in the Vanderburgh Superior Court reversed; knowledge of danger by employee; assumption of risk.

*Incompetency of servant running machine.*

*AMERICAN WIRE NAIL CO. v. CONNELLY*, 8 Ind. App. 398 (November Term, 1893); employee, in nail factory, injured by machinery negligently run by a fellow-employee, alleged to be incompetent, whereby his foot and leg were burned by a heated rod; judgment for plaintiff in the Madison Circuit Court was reversed, it being shown by answers to interrogatories that the fellow-servant was competent to perform his duties.

*Employee injured while operating machine — Dangerous place to work — Vice-principal — Proximate cause.*

**COLE BROTHERS v. WOOD**, 11 Ind. App. 37 (May Term, 1894); employee working in defendant's factory, under directions of foreman, injured by certain pieces of wooden tubing, while he was operating a certain auger run by machinery; dangerous place to work; held that foreman at time was vice-principal, and that defendant violated duty to keep working place reasonably safe, which was proximate cause of injury; judgment for plaintiff on special verdict in the Putnam Circuit Court for \$3,000 affirmed; exhaustive review of the Indiana fellow-servant cases and the respective duties of master and servant, in the opinion rendered by Lorz, J.; also a dissenting opinion by Ross, J.

*Defective belting to machinery — Notice — Promise to repair.*

**ROMONA OOLITIC STONE CO. v. PHILLIPS**, 11 Ind. App. 118 (May Term, 1894); employee injured by defective belt to machinery which resulted in his hand being caught and crushed in the belt and pulleys; judgment for plaintiff in the Morgan Circuit Court reversed; notice of defect; promise to repair; erroneous instruction; the case is discussed at great length by Davis, J., and there is also a long dissenting opinion by Ross, J., who held that the demurrer to each paragraph of the complaint should have been sustained.

*Employee injured by file-grinding machine — Failure to inform master of inexperience.*

**ARCADE FILE WORKS v. JUTEAU**, 15 Ind. App. 460 (May Term, 1896); employee, operating a file-grinding machine, injured by hand being caught and three of his fingers injured; dangerous and defective machine; failure to instruct employee in use of machine; judgment for plaintiff in the Hamilton Circuit Court reversed and petition for rehearing overruled; master not liable where servant undertakes to operate machinery with which he is not familiar, and does not inform master of his inexperience.

*Defective machinery — Notice by master — Promise to repair — Liability for injury to employee.*

**EAST CHICAGO IRON & STEEL CO. v. WILLIAMS**, 17 Ind. App. 573 (November Term, 1896); employee injured by defective machinery in rolling mill; judgment for plaintiff in the Lake Circuit Court was affirmed; rule of assumption of risk is thus stated: "The general rule is, that a servant assumes all the ordinary risks of the service he enters. And it is not enough that a servant, after he learns of the defect, simply notifies the master and continues in the service. But if the servant knows of the defect, and notifies the master, and the master expressly or impliedly promises to remedy the defect by making necessary repairs, and the servant relies upon such promise and continues in the service, and within a reasonable time after the promise to repair has been made is injured, he will not be held to have assumed the risk."

**Notes of cases relating to injuries to minor employees caused by machinery, etc.**

*Minor employee hit by flying object from planing machine.*

In **DANLEY ET AL. v. SCANLAN (BY NEXT FRIEND)**, 116 Ind. 8 (May Term, 1888), minor employee, fifteen years of age, injured by being struck in the eye by a Oliver which flew from a planing and moulding machine he was operating, judgment for plaintiff in the Hendricks Circuit Court was reversed and petition for rehearing overruled on question of pleading and practice.

*Minor employee stepping over revolving shaft of paper-cutter — Assumption of risk.*

In *WABASH PAPER CO. v. WEBB*, 146 Ind. 303 (November Term, 1896), minor employee, seventeen years of age, stepping over revolving shaft of paper cutter machinery, falling over and his leg caught and crushed, judgment for plaintiff in the Grant Circuit Court was reversed, he being negligent in passing the way he did when there were two other comparatively safe ways; assumption of risk.

*Minor employee caught in planer machine.*

*TAYLOR ET AL. v. WOOTAN (BY NEXT FRIEND)*, 1 Ind. App. 188 (November Term, 1890); minor employee, twelve years old, injured by arm catching in "planer" machine in the Taylors' wagon factory; judgment for plaintiff in the Floyd Circuit Court was affirmed.

*Minor employee injured by heavy drop-hammer — Extra weight — Master liable.*

*NOBLESVILLE FOUNDRY & MACHINE CO. v. YEAMAN (BY NEXT FRIEND)*, 3 Ind. App. 521 (November Term, 1891); minor employee, sixteen years old, assisting other employees in making a large wrench, in which work a heavy drop-hammer was used, injured by hand being caught and crushed by the hammer while trying to take hold of a pair of tongs which he was ordered to do by the foreman; foreman's knowledge of plaintiff's lack of strength to handle the tongs; master liable; judgment for plaintiff in the Hamilton Circuit Court affirmed.

*Minor employee injured while oiling planer — Contributory negligence.*

*STEWART ET AL. v. PATRICK*, 5 Ind. App. 50 (May Term, 1892); minor employee sixteen years old, injured by fingers of right hand being cut off while oiling a planer machine; judgment for plaintiff in the Shelby Circuit Court was reversed, the general verdict not being upheld where the jury found, in effect, that the employee did not exercise reasonable care required from one of his age, experience, etc.

*Minor employee injured by "wood worker."*

*HAYNES, SPENCER & CO. v. ERK*, 6 Ind. App. 332 (November Term, 1892); minor employee, sixteen years old, employed as a roustabout in defendant's factory, injured by fingers of left hand being cut off by machine known as Universal Wood-worker; judgment for plaintiff for \$2,750 in the Randolph Circuit Court affirmed.

*Coat sleeve catching in set screw — Minor employee injured.*

*KELLER v. GASKILL (BY NEXT FRIEND)*, 9 Ind. App. 670 (November Term, 1893); minor employee, seventeen years old, injured by machinery used in making dental tools and appliances; judgment for plaintiff in the De Kalb Circuit Court for \$2,600 was reversed, the findings in the special verdict failing to show absence of contributory negligence on plaintiff's part; injuries sustained by plaintiff, left forearm broken, etc., by coat sleeve catching in set screw which projected from shaft.

*Minor employee injured while operating "wood worker."*

*ELWOOD PLANING MILL CO. v. JACKSON (BY NEXT FRIEND)*, 11 Ind. App. 181 (May Term, 1894); minor employee, fifteen years of age, taken from usual work by foreman and set to work upon a dangerous machine, the Universal Wood-worker, injured while so employed; judgment for plaintiff in the Madison Circuit Court affirmed.

*Female employee injured by mangle in laundry.*

**PHILLIPS v. MICHAELS, GUARDIAN,** 11 Ind. App. 672 (November Term, 1894); minor employee, a girl between fifteen and sixteen years of age, injured while operating a mangle in defendant's laundry, her hand being torn and burned; judgment for plaintiff for \$1,800 affirmed.

*Minor employee injured by cutting machine.*

**AMERICAN STRAWBOARD COMPANY v. FOUST,** 12 Ind. App. 421 (November Term, 1894); minor employee, operating cutting machine in defendant's factory, directed by foreman to try to repair a break in the paper which was passing through the machine, injured by arm being caught between rollers of the machine; judgment for plaintiff in the Hamilton Circuit Court for \$2,500 affirmed and petition for rehearing overruled.

*Minor employee placed in dangerous position, run over by train — Failure to warn employee of danger.*

In **HILL ET AL. v. JUST (BY NEXT FRIEND)**, 55 Ind. 45 (November Term, 1876), minor employee, fifteen years of age, in employ of defendants, contractors for construction of a railroad, placed in charge of an alleged vicious horse in a narrow space between two trains of cars, injured by being thrown beneath one of the trains, judgment for plaintiff in the St. Joseph Circuit Court for \$4,000 was affirmed. It was held that where a master places a servant of tender years in a dangerous place, he is bound to give such servant warning of the danger.

## THE BIG CREEK STONE COMPANY v. WOLF, ADM'X.

*Supreme Court, Indiana, September, 1894.*

[Reported in 138 Ind. 496.]

**EMPLOYEE KILLED BY FALL OF DERRICK — DEFECTIVE APPLIANCE — NOTICE OF DEFECT — PLEADING — COMPLAINT.** — In an action to recover damages for the death of plaintiff's intestate, an employee in defendant's rock quarry, who was killed by the breaking and falling of a defective derrick, it was held that the complaint sufficiently stated a cause of action where it showed that the defendant had knowledge of the defect and that the decedent was ignorant thereof.

**KNOWLEDGE OF DEFECT BY EMPLOYEE — MASTER NOT LIABLE.** — But in such case, where the evidence proved, beyond controversy, that the injured employee had an equal, if not a better, opportunity of knowing the condition of the derrick than the defendant, there was no liability on the part of the master and recovery could not be had for the injury to the employee (1).

1. On the subsequent trial of the **WOLF** case in the Monroe Circuit Court, the jury returned a special verdict, being answers to interrogatories, upon which the court rendered judgment for appellee (railway company) and from which appellant (plaintiff below) appealed, which judgment, however, was affirmed. See **WOLF, ADM'X v. THE BIG CREEK STONE COMPANY**, 148 Ind. 317 (September Term, 1897). HOWARD, J., in rendering the opinion said: "It

APPEAL from the Monroe Circuit Court. The facts appear in the opinion. *Judgment reversed.*

F. M. FINCH, J. A. FINCH, J. H. LOUDEN and W. P. ROGERS, for appellant.

J. H. JORDAN, J. R. EAST, O. MATTHEWS and J. GRIMSLY, for appellee.

**Coffey, J.**—This was an action by the appellee, in the Monroe Circuit Court, against the appellant, to recover damages on account of the death of Chris. Wolf, the husband of the appellee. Wolf was killed August 23, 1890, in the rock quarry of the appellant, in Monroe county, by the falling of a derrick. It is alleged in the complaint that the deceased, at the time of his death, was employed at the quarry in the capacity of an engineer; that appellant kept, and used at the quarry, a derrick which was wholly insufficient for the purposes for which it was used; that its timbers were weak and old; that in constructing, erecting and putting it in place for use it was necessary, in order to secure the top attachments of the two knee braces, which were a necessary part of the machine, to have an iron key and fastening passing through the iron bolt, which was attached to the top of the mast to securely hold the braces in position, and thereby prevent the derrick from coming apart, breaking and falling when used in hoisting large stones, all of which was well known to the appellant at the time the same was erected, and, well knowing that fact, it negligently failed to put any key through said bolt; that the appellant, knowing the weak and defective condition of the derrick, proceeded to use the same on August 23, 1890, in hoisting large stone, by reason of which it broke and fell, killing the said Wolf without any negligence or fault on his part; that Wolf was ignorant of the defects in the derrick, while the appellant had full knowledge of the same.

is even more clear here than it was on the former appeal that, while the appellee was no doubt at fault in using an old and unsound derrick in lifting and moving stones too heavy for its capacity, yet the deceased, having built that derrick, and used it for years in his own quarry; having sold it to appellee, and assisted in setting it up in appellee's quarry; having also observed and proposed to repair the weakness at the very part that after-

wards broke, and thus caused his death; having, moreover, at the time of the accident, turned aside from his proper duties as engineer, and assisted in pushing the stone that broke down the derrick, must be held to have had equal, if not better, opportunities of knowing the condition of the machinery that caused his death than the appellee, and so to have assumed all risks of danger to himself."

A trial of the cause resulted in a verdict and judgment for the appellee, from which the appellant appeals to this court, and assigns as error: First, that the Circuit Court erred in overruling the appellant's demurrer to the complaint; second, that the Circuit Court erred in overruling the appellant's motion for a new trial.

We think the complaint states a cause of action. The rule that the master is bound to use ordinary care in furnishing the servant a safe place to work, and safe machinery and appliances, is too well settled and too well known to require the citation of authorities. This complaint shows a failure on the part of the appellant to discharge that duty, and alleges that Wolf, the deceased, was ignorant of the defective condition of the derrick which caused his death. The court did not err in overruling a demurrer to this complaint.

It is contended by the appellee that we cannot consider the other error assigned, for the reason that the evidence in the cause is not properly in the record. We cannot agree with the appellee in this contention. The longhand manuscript of the official reporter is embodied in a proper bill of exception, in exact compliance with the rule established in the case of *Wagoner v. Wilson*, 108 Ind. 210, and the cases following it. When the evidence comes to us in this form, we will not presume that the bill of exceptions was blank when signed by the judge, in the absence of some legitimate showing to the contrary. We think the evidence is properly in the record.

Many questions are presented on the second assignment of error; but as we have reached the conclusion that the verdict of the jury is not sustained by the evidence, we deem it unnecessary to consider any other question.

The facts in the case, as they are developed by the evidence, are that Wolf, the deceased, formerly owned the derrick, the breaking of which resulted in his death, using it in a quarry operated by himself. He sold it to the appellant, and the evidence tends to prove that he was entrusted with the duty of putting it up in the quarry owned by the appellant; at least, it is proven and not denied that he assisted in putting it up. He was requested by one of the employees of the appellant to put in the key mentioned in the complaint, but replied that he would put that in some other day. Within a day or two after it was erected at the stone quarry of the appellant in lifting a large stone, the

derrick broke and Wolf, from whom it was purchased, was crushed and killed.

Without the allegations in the complaint to the effect that the deceased was ignorant of the defects in the derrick, the falling of which resulted in his death, and that the appellant had knowledge of such defects, the appellee could not have secured a lodgement in court. *Brazil Block Coal Co. v. Young*, 117 Ind. 520; *Rietman v. Stolte*, 120 Ind. 314; *Rogers v. Leyden*, 127 Ind. 50; *Lake Shore, etc., R'y Co. v. Stupak*, 108 Ind. 1 (1).

In order to succeed in the action, it was necessary to prove these allegations. The evidence proves, beyond controversy, that he had an equal, if not a better, opportunity of knowing the condition of the derrick than the appellant. Where the danger is equally known or open to both the master and the servant, there is no liability on the part of the master. *Vincennes, etc., Co. v. White*, 124 Ind. 376; *Swanson v. City of Lafayette*, 134 Ind. 625.

Judgment reversed with directions to the Circuit Court to sustain the appellant's motion for a new trial.

#### Notes of cases arising out of injuries sustained by defective appliances.

##### *Employee injured by iron safe falling upon him — Defective appliance.*

In *BRADBURY ET AL. v. GOODWIN*, 108 Ind. 286 (November Term, 1886), employee, while assisting in removing an iron safe from one building to another, injured by framework giving way and the safe falling upon him and breaking his leg, judgment for plaintiff in the Wayne Circuit Court was affirmed.

##### *Employee injured by falling from ladder — Defective appliance.*

In *JENNEY ELECTRIC LIGHT & POWER CO. v. MURPHY*, 115 Ind. 566 (May Term, 1888), employee, engaged in adjusting electric wires over a door in a hotel, injured by the slipping and turning of a ladder, which caused him to fall, spraining his elbow and otherwise injuring him, judgment for plaintiff in the Allen Superior Court was reversed on the ground that the defect in the ladder, if any, was known to the employee, and he assumed the risk of using same.

##### *Employee assisting in loading timbers on car — Defective crane — Notice of defect — Assumption of risk.*

In *RIETMAN ET AL. v. STOLTE*, 120 Ind. 314 (May Term, 1889), it was held (as per syllabus to official report) that "one who, being employed by another to assist in loading heavy timbers upon a car, can, by looking, see that the hooks attached to a crane used in the work are dulled and incapable of safely holding the timbers raised by it, but continues in the service without objection, will be deemed to have assumed the risk created by the defect, and cannot recover for

1. See these cases (and the *WHITE* with the Indiana cases in this volume case cited in the case at bar) reported of Am. Neg. Cas., *post*.

an injury resulting to him by reason thereof." Judgment for plaintiff in the Vanderburgh Superior Court *reversed*.

*Engineer injured by fall of defective ladder.*

In STANDARD OIL COMPANY *v.* BOWKER, 141 Ind. 12 (November Term, 1894), engineer, oiling engine, injured by fall of defective ladder, judgment for plaintiff in the Lake Circuit Court was *affirmed*.

*Defective crowbar — Obvious defect — Master not liable.*

McBRIDE *v.* INDIANAPOLIS FROG & SWITCH CO., 5 Ind. App. 482 (November Term, 1892); employee injured by slipping of crowbar which he was using, causing him to fall violently to the ground, while working on a splice block at a crossing; judgment on special findings rendered for defendant, notwithstanding general verdict for plaintiff in the Marion Circuit Court, *affirmed*; obvious defect in tool; failure of employee to look for same.

*Dangerous place — Defective canvas covering — Employee injured — Knowledge of danger.*

MUNCIE PULP CO. *v.* JONES, 11 Ind. App. 110 (May Term, 1894); employee carrying boards on plank walk laid across a hole in a third-story floor in defendant's mill, covered with rotten canvas so as to completely conceal the hole, knocked off the plank walk and thrown upon the canvas which gave way and he fell twenty-eight feet to the ground, sustaining serious injuries; judgment for plaintiff in the Delaware Circuit Court *reversed*, it being held that the plaintiff was chargeable with knowledge of the danger.

*Car repairer killed by fall of defective car — Inspection — Master liable.*

G. H. HAMMOND COMPANY *v.* MASON, ADM'R, 12 Ind. App. 469 (November Term, 1894); car inspector, in defendant's repair shops, whose duty it was to inspect cars and mark each defective car with chalk so that the employees might have notice, directing plaintiff's intestate to make certain repairs to a car which had not been properly marked, and while under the car it fell and crushed him to death, the accident being caused by a broken kingbolt and center plates; judgment for plaintiff in the Lake Circuit Court *affirmed*.

*Employee assisting in construction of building struck by beam breaking — Assumption of risk.*

STEWART *v.* NEW ALBANY MFG. CO., 15 Ind. App. 184 (November Term; 1895); employee assisting in the construction of a building and frame saw mill for defendant company, acting under directions of another employee in charge of the work, struck on the leg by the breaking of a beam; judgment on demurser to complaint *affirmed*; obvious danger; assumption of risk.

*Employee killed by a car — Defect — Failure of co-employee to signal — Fellow-servant.*

CLARK COUNTY CEMENT CO. *v.* WRIGHT, ADM'R, 16 Ind. App. 630 (November Term, 1896); employee, engaged in coaling the cement kilns in defendant's mills, struck and fatally injured by a car, the machinery propelling which was alleged to be defective; judgment for plaintiff in the Clark Circuit Court *reversed*; burden upon plaintiff to show decedent had no knowledge of the alleged defect, and that he had not assumed the risk of danger; decedent and the crusher feeder, whose duty it was to signal as to the car, were fellow-servants.

*Dangerous place — Employee struck by projections from car.*

In **SALEM STONE & LIME CO. v. GRIFFIN**, 139 Ind. 141 (May Term, 1894), employee injured by projections from tramway cars in a walk constructed along the tramway in defendant's mill, along which employees passed in performance of duties, judgment for plaintiff in the Jackson Circuit Court was affirmed.

**EXPLOSION OF STEAM BOILER — LIABILITY OF MASTER FOR ACT OF AGENT.** — In **MITCHELL ET AL. V. ROBINSON**, 80 Ind. 281 (November Term, 1881), employee injured by the explosion of a steam boiler connected with the engine and machinery in defendant's slaughter house, judgment for plaintiff in the Floyd Circuit Court was affirmed, and petition for rehearing overruled. After discussing questions of pleading the court (per Woods, J.) said: "It is further insisted that the verdict is not sustained by sufficient evidence, because the injury resulted from the carelessness of a fellow-servant of the appellee engaged in the same employment.

"The evidence may be said to have shown that the appellants, who resided in Kentucky, had formed a partnership for the purpose of buying and slaughtering hogs in New Albany, Indiana, in the premises where the appellee was hurt, one of the appellants being the owner of the premises. At the time of the accident, they were engaged in preparations for commencing the business. The defendants were not personally present, and had no notice of the defective condition of the boiler. They had employed one Jones as a general superintendent of their proposed business, and in that capacity he was present, superintending the said preparations, and had engaged the appellee to come and go to work as a common laborer on the day when he was injured. He came accordingly, in the morning, and was preparing to go to work, but Jones had not yet arrived, when the explosion took place. Some days before Jones had been notified, by one who had been employed to clean the boiler and had been in it for that purpose, that the boiler was unsafe; that there was a crack in the head of it more than a foot long.

"In support of their claim that Jones and the appellee were fellow-servants, and that the appellee can have no recourse upon the master for an injury caused by the negligence of Jones to notify the master of the defective condition of the boiler, the following cases are cited: *Columbus, etc., R'y Co. v. Arnold*, 31 Ind. 174 (1); *Wright v. N. Y. Cent. R. R. Co.*, 25 N. Y. 562; *Hayden v. Smithville Manufg. Co.*, 29 Conn. 548, 13 Am. Neg. Cas. 669; *Roberts v. Smith*, 2 Hurlst. & N. 213; *Wigmore v. Jay*, 5 Exch. 354; *Keegan*

1. Reported with the Indiana cases in this volume, *post*.

*v.* Western R. R. Co., 8 N. Y. 175; Ormond *v.* Holland, El. Bl. & El. 102 (1).

"The case does not, as we conceive, come within the principle

1. In Roberts *v.* Smith and another, 2 Hurl. & N. 213 (Exch. Ch., 1857), the declaration stated that the plaintiff, a bricklayer, entered into the service of the defendants upon the terms that they should take and use all due, reasonable and proper means and precautions in order to prevent accident, damage or injury, or unreasonable or unnecessary risk or damage from happening or occurring to the plaintiff in the performance of his duty as such servant; that the defendants did not take such reasonable precautions, and by reason thereof, and of the neglect of duty of the defendants, the plaintiff was employed on a scaffold which, for want of such precautions, was rotten and unsafe, which the defendants knew, and whereof the plaintiff was wholly ignorant, and in consequence thereof a part of the scaffold broke and the plaintiff fell to the ground. Pleas: 1. Not guilty. 2. Traverse of employment on the terms alleged. At the trial, it was proved that the defendants had employed a laborer to erect the scaffold. The materials for the scaffold were in bad condition. The laborer broke several of the putlogs in trying them. One of the defendants told him not to break any more, that the putlogs would do very well. The laborer used such as he thought sound. One of the putlogs so used having given way the scaffold fell, and the plaintiff was injured. On this evidence, the judge at the trial directed a nonsuit. Held, on appeal to the court of Exchequer Chamber, that there was evidence to go to the jury of the liability of the defendants. New trial was granted on the ground that the evidence appeared to show personal interference and negligence of the master.

In Wigmore *v.* Jay, 5 Exch. 354 (Exch. of Pleas, 1850), it appeared that

defendant, a master builder, having contracted to build a certain building, employed W. as a bricklayer. The scaffolding was erected under the superintendence of the defendant's foreman, the defendant not being present, and was constructed by men in the employ of the defendant, who used an unsound ledger pole, in consequence of which the scaffold broke while W. was at work upon it, and he was thrown to the ground and killed. The unsoundness of the pole had been previously pointed out to the foreman. Held, that no action could be maintained against the defendant under the 9 and 10 Vict. c. 93, there being no evidence that the foreman was an improper person to employ for that purpose.

In Ormond *v.* Holland, El. Bl. & El. 102, s. c. 96 Eng. C. L. 100 (Q. B., 1858), it was held that a master is responsible to his servant for the injury received in the course of his service, if it be shown to have been occasioned by the personal negligence of the master. Such negligence may be brought home to the master by showing either his personal interference to be the cause of the accident, or that he negligently retained incompetent servants, whose incompetency was the cause of the accident; but in the absence of a special contract the master is not liable for an accident not proved to have been occasioned by his personal negligence. In this case the defendants were builders and were constructing a church, the plaintiff working for them as a bricklayer. While plaintiff was ascending a ladder one of the rounds broke and he fell and was injured. There was some evidence that the ladder was defective, but none to bring knowledge to defendants. Defendants held not liable for the accident.

contended for, as applicable to fellow-servants engaged in the same employment, but rather within the rule that a general agent employed to represent the master in his absence, and charged with the duties which it would be incumbent on the master to perform, if he were present, is not a mere fellow-servant, whose negligence can impose no liability upon the master, to an injured subordinate. The owner of mills or machinery, which men are employed to operate, owes duties to the employees which he cannot escape by absenting himself and committing the entire charge to an agent. This view is fully supported by the case of *Corcoran v. Holbrook*, 59 N. Y. 517, where it is shown that the individual who does act by an agent, as well as a corporation which can act in no other way, is responsible for the neglect of the general agent so employed. To the same effect are *Gormley v. Vulcan Iron Works*, 61 Mo. 492; *Shanny v. Androscoggin Mills*, 66 Me. 420; *Cumberland, etc., R. R. Co. v. State*, 44 Md. 283; *Cumberland, etc., R. R. Co. v. State*, 45 Md. 229; *Brabbits v. Chicago, etc., R'y Co.*, 38 Wis. 289; *Shearm. & Redf. Neg.*, § 102; *Wharton Neg.*, § 222. This is in harmony with the cases wherein it is held that notice to an agent of a corporation, relating to any matter of which he has the management and control, is notice to the corporation. *Pittsburgh, etc., R'y Co. v. Ruby*, 38 Ind. 294; *Ohio, etc., R'y Co. v. Collarn*, 73 Ind. 261 (1); *Malone v. Hathaway*, 64 N. Y. 5; *Murphy v. Smith*, 19 C. B., N. S., 361 (2).

"Indeed, the true ground of liability, as shown in the pleadings and the evidence, is the failure of the defendants to furnish safe machinery. Their general agent or superintendent represented them in respect to this duty; his knowledge was their knowledge, and so they must, on plain principles, be held responsible for the result.

"Under the circumstances shown in this case, we cannot say

1. Reported with the Indiana cases in this volume, *post*.
2. In *Murphy v. Smith*, 19 C. B., N. S., 361 (Com. Pl., 1865), it was *held* that to render a master liable for an injury to one in his employ, through the negligence of another person also in his employ, it must be shown that the latter was placed by the master in such a position of trust and authority as to be fairly considered as his representative in the establishment. The plaintiff, in this case, was a boy sixteen years of age, employed in defendant's match factory, and while at work was injured in an explosion of chemical substances. The negligence charged was that of defendant's foreman, but the evidence failed to establish that the person in charge of the chemicals at the time of the explosion had any authority from defendant to act as foreman. Such person was merely a fellow-servant of the plaintiff for whose negligence defendant was not responsible.

that the jury were not warranted in finding that Jones was the general agent of the defendants, charged with the duty of representing them in all respects material to be here considered, and that his negligence was imputable to them. As against two of the appellants, the proof is slight; but yet enough to have warranted the submission of it to the jury, and, therefore, enough to support their verdict against interference by this court on appeal." \* \* \*

**EXPLOSION OF BOILER IN MILL—OWNER OF MILL NOT LIABLE WHERE SAME WAS LEASED TO ANOTHER PARTY.** — In **DELLER v. HOFFERBERTH**, 127 Ind. 414 (*November Term, 1890*), it appeared from the complaint that plaintiff was employed by the defendant to work in a saw-mill owned by the defendant, and that while engaged in the discharge of his duties under the employment, three of the boilers connected with the mill exploded, and he was greatly injured; that the explosion occurred by reason of the defectiveness and unsafe condition of the boilers, and each of them, each of them being old and rusted, and unfit for use, all of which was known to the defendant, who negligently and carelessly used them in his said business; that the defective and unsafe condition of the boilers was unknown to the plaintiff, and that the explosion and injury were not caused by the fault or negligence of the plaintiff. The second paragraph averred that at the time of the explosion the defendant had leased the mill to one Joseph N. Morrow, to be operated by him in sawing for the defendant; that as a part of the mill, and embraced in the lease, were three boilers, and that at that time they were defective and unfit for use as such, in this, the iron of which they were made was old, rusted, rotten and leaky, had lost its elasticity, and was unable to withstand the pressure of steam, and the use of said boilers for said reason was necessarily dangerous, and the said condition was known to the defendant at the time of said lease. On the trial in the Vanderburg Circuit Court, the defendant obtained judgment which, on appeal to the Supreme Court, was *affirmed*. It was held that the owner was not liable for the explosion of the steam boilers, leased to another, where the defects causing the accident arose subsequently to the lessee taking possession, even though the boilers were in such a condition that they would naturally become a nuisance and dangerous if the lessee failed to repair same.

*Bursting of flask containing molten iron — Pleading and proof — Nonsuit.*

In **DRINKOUT v. EAGLE MACHINE WORKS**, 90 Ind. 423 (*May Term, 1883*), employee injured by feet being burned and scalded by the bursting of a "flask" containing molten iron, *defective appliances*,

etc., being alleged, it was held that the complaint was not supported by evidence that the injury was caused by negligence of defendant's superintendent, and judgment for defendant in the Superior Court of Marion county was affirmed.

*Natural gas explosion — Defective pipes — Employee killed.*

ALEXANDRIA MINING & EXPLORING CO. v. IRISH, ADM'R, 16 Ind. App. 534 (*November Term, 1890*); employee, working in building, killed in natural gas explosion, which blew down the building; defective gas pipes causing gas to escape and accumulate in large quantities and to explode when it came in contact with fire; negligent operation of natural gas pipes by defendant; proximate cause; judgment for plaintiff for \$3,250 in the Tipton Circuit Court affirmed.

MINOR EMPLOYEE INJURED IN EXPLOSION IN ROLLING MILL — CONTACT OF HOT SLAG WITH WATER — INDEPENDENT CONTRACTOR. — In THE NEW ALBANY FORGE AND ROLLING MILL v. COOPER (BY NEXT FRIEND), 131 Ind. 363 (*February, 1892*), judgment for plaintiff in the Floyd Circuit Court was reversed and petition for rehearing overruled. COFFEY, J., stated the case as follows: "This was an action by the appellee, a minor, by his next friend, against the appellant, to recover damages occasioned by a personal injury. The complaint alleges, in substance, that the appellee, who was an infant, without knowledge or experience of the dangerous properties of hot slag or cinder, was employed by the appellant, a corporation engaged in forging and rolling iron, to carry and wheel away from a furnace and dump upon adjacent ground, a part of which was covered with water, hot slag and cinder; that the appellant, with knowledge that such slag and cinder were liable to explode and injure the appellee if they came in contact with damp earth or water, negligently failed to instruct the appellee as to his duties, or to warn him of the danger of handling such slag and cinder, or to give him any instructions which would enable him to safely perform his duties; that on the third day of his service, and while he was, by the direction of appellant's foreman, engaged in wheeling away and dumping, at the place where he was directed to deposit the same, hot iron slag, it came in contact with a small quantity of water which had collected on the surface of the ground at that place, and at once exploded with force and violence, burning and wounding appellee and destroying his eyesight, etc.; that the appellee's injuries were caused solely by the negligence of the appellant, and without any fault or negligence on the part of the appellee. \* \* \* We think the complaint states a cause of action. In view of its allegations in relation

to the ignorance of the appellee, there is nothing in it from which it can be inferred that the appellee was guilty of negligence. As the place the appellee was directed by the appellant to dump the slag and cinder is alleged to have been covered by water, the presumption is that such fact was known to the appellant."

After citing 2 Thompson on Negl. 977, the court also cited *Thall v. Carnie*, 5 N. Y. Supp. 244, where it was said: "When a master engages an inexperienced servant, especially if of tender years and presumed ignorance, and places him in a place of latent or obscure danger, it is the duty of the master to instruct the servant how to do the work, and at the same time be on his guard against the danger, and he is liable for injuries occasioned by failure to give such instructions." See also *Cleveland, etc., Co. v. Corrigan*, 20 N. E. Rep. 466; *Gamble v. Hines*, 50 Hun, 604. \* \* \*

"The evidence in the cause, as it comes to us, establishes the following facts: The appellant is the owner of a rolling mill in the city of New Albany, in which scrap-iron is heated and rolled into bars suitable for the market. It furnishes the furnaces, rollers, scrap-iron and fuel necessary to carry on the business. At the time of the accident in question the appellant had a contract with one Murphy, by the terms of which the appellant furnished to him the scrap-iron, properly assorted and arranged, to be put into the furnace to be heated to the proper temperature for squeezing and rolling. The appellant was also to furnish the necessary fuel and heat to heat the iron, and Murphy's contract required him to heat it properly, and deliver it at the squeezer, where it was squeezed and delivered to the rollers to be rolled into bars. By the terms of this contract Murphy received a stipulated price for each ton heated by him. In placing the iron in the furnace, taking it out, delivering it at the squeezer, and removing the slag and cinder, Murphy required assistance. This assistance was hired and paid for by himself at such price as he and his helpers might agree upon. One of Murphy's regular helpers being ill, the appellee was hired by Murphy to take his place temporarily. On the third day of his employment he dumped some slag into a small pool of water, when an explosion took place, resulting in serious and permanent injuries to the appellee.

"The evidence tends to show that when hot slag is dumped upon damp ground or into water it is liable to explode, and is very dangerous. Of this tendency the appellee, it is claimed, was ignorant, and was not informed of the fact either by the appellant or Murphy. He was, at the time of the accident, about nineteen years old. The appellant's business was under the control and management of a general superintendent, who managed the rolling mill and

the forge works connected therewith, while the rolling mill was under the immediate control of a superintendent appointed for that purpose. It was part of the business of the superintendent of the rolling mill to see that those who had contracts for heating iron did a certain amount of work each day, and that it was properly done. He also had power to discharge such heaters, but had nothing to do with hiring their helpers, keeping their time or paying them.

"At the proper time the appellant asked the court to give the jury the following instruction:

"'The company had the right to make any contract or arrangement it saw fit for the management of any part of its business, and for the carrying on of any department of its work, and if it did make a contract with Andrew Murphy, or with any other person, to act as heater, and to heat its iron in its furnaces, giving to him control over that part of its machinery and business, and paying him therefor by the ton; and if under that arrangement Murphy hired his own men and paid their wages out of his own moneys; and if Murphy, in the course of his business under this contract, hired the plaintiff, Cooper, and was to pay Cooper for his work, then Murphy was the master and employer of Cooper, and not the Forge and Rail Mill Company, and there should be a verdict for the defendant.'

"The court refused to give this instruction as asked, but modified the same by adding thereto the words: 'And had control of his services independent of the company,' and gave same as modified.

"It is well settled that where one lets a contract to another to do a particular work, reserving to himself no control over such work except the right to require it to conform to a particular standard when completed, he is not liable for the negligence of the party to whom the contract is let. *Vincennes Water Supply Co. v. White*, 124 Ind. 376; *Wabash, etc., R'y Co. v. Farver*, 111 Ind. 195; *Ryan v. Curran*, 64 Ind. 345; *Blake v. Ferris*, 5 N. Y. 48; *Pack v. Mayor, etc.*, 8 N. Y. 222; *King v. N. Y. Cent. R. Co.*, 66 N. Y. 181; *Town of Pierrepont v. Loveless*, 72 N. Y. 211.

"In the case of *Wabash, etc., R'y Co. v. Farver*, 111 Ind. 195, Williams was employed to use his portable engine, at a given price *per diem*, to pump water, furnishing his own help. He was required, by the terms of his contract, to pump at such times as should be necessary to enable the employees of the railway company to prosecute certain work in which they were engaged. It was held that he was an independent contractor within the meaning of the rule above stated, and that the railway company was not responsible for his negligence.

"Under the facts in this case we think Murphy was an independent contractor under the rule we are now considering, and for that reason the court erred in refusing to give the instruction asked by the appellant. The modification was, we think, well calculated to mislead the jury. While it is shown that the appellee was employed by Murphy, and that the appellant could not discharge him, there is evidence in the record tending to show that if, in the opinion of the immediate superintendent, he was not doing his duty as a helper, such superintendent had the power to discharge Murphy if he, upon request, refused to discharge the appellee. Under the instruction as modified the jury might well have concluded that this fact would render the appellant liable for the negligence of Murphy in failing to inform the appellee of the danger attending the work of dumping slag." \* \* \* Judgment reversed.

FALL OF WALL OF BUILDING — SERVANT INJURED BY NEGLIGENCE OF FELLOW-SERVANT — LIABILITY OF NEGLIGENT SERVANT. — In *HINDS v. HARBOU*, 58 Ind. 121 (*November Term, 1877*), an action against Hugh L. Hinds and the Studebaker Brothers Manufacturing Company, for injuries suffered by Harbou caused by the alleged negligence of defendant Hinds, who was an employee of the corporation and a co-employee of plaintiff, it was held that an action may be maintained against a servant for injuries happening through his negligence to a fellow-servant in the employ of the same master in the same general business; but judgment for plaintiff against Hinds in the St. Joseph Circuit Court was *reversed* for error in permitting a witness to testify as an expert where he was not shown to be competent to testify as such; also for error in giving a certain instruction. The facts in the case, from the complaint, show that Harbou was a carpenter, "and was employed in his trade by the Studebaker Brothers Manufacturing Company, to labor in and about the constructing of a building, which the company was then erecting, to be used by them as a wagon and carriage factory; that the appellee [Harbou] was, by the direction of the said company, placed under charge of the appellant, Hinds, who was then in the employment of the company as their general superintendent of buildings, and of the men engaged on the said building; that, on the 21st day of November, 1874, while so laboring on the second story of the building in question, the defendants carelessly and negligently caused a trench, or ditch, to be dug along the side of a brick wall forming a part of said building, to such a depth, and so close to the wall, that the wall fell, carrying down with it the second story, on which the appellee was laboring,

and thereby threw down and greatly injured the appellee." The jury rendered a verdict in favor of the Studebaker Brothers, but against Hinds.

In **HINDS v. OVERACKER**, 66 Ind. 547 (*May Term, 1879*), which case originated in the disaster described in **HINDS & HARBOU**, 58 Ind. 121 (see preceding paragraph), judgment for Overacker in the La Porte Circuit Court for \$1,000 was *affirmed*. Plaintiff was an employee and was injured by the fall of the building in which he was working. It was held that "a servant is liable to a co-servant in damages, for a physical injury resulting to the latter by means of the negligence of the former, in the performance of labor for a common master."

In **ROGERS v. OVERTON**, 87 Ind. 410 (*November Term, 1882*), a servant was held liable for negligence resulting in injury to another servant. Plaintiff and defendant were employed by a railway company as section men, and plaintiff was injured by the fall of a heavy bar which broke while he was endeavoring to place same in position under orders of section boss. Judgment for plaintiff was *affirmed*. See also **Hinds v. Harbou**, 58 Ind. 121; **Hinds v. Overacker**, 66 Ind. 547 (preceding cases reported herein).

**EMPLOYEE INJURED BY FALL OF LARGE CASTING IN GLASS FACTORY — MASTER LIABLE.** — In **THE W. C. DE PAUW COMPANY v. STUBBLEFIELD**, 132 Ind. 182 (*September, 1892*), employee injured by fall of large casting upon his leg while he was working in a ditch or trench in defendant's glass factory, judgment for plaintiff in the Floyd Circuit Court was *affirmed* (1). The facts of the case are stated by COFFEY, J., as follows:

"The evidence on the part of the appellee [plaintiff below], briefly stated, tended to show that the appellant [defendant below] was engaged in the manufacture of plate glass at the city of New Albany. In one of its buildings, used for that purpose, was a pit, about fourteen inches wide and about three feet in length, formerly used

1. In **MYERS v. THE W. C. DE PAUW COMPANY**, 138 Ind. 590 (*September, 1894*), judgment for defendant sustaining demurrer to complaint in the Floyd Circuit Court, was *affirmed*. The complaint alleged the appellant's employment for the appellee in carrying plate glass to the grinding tables in appellee's plate-glass factory; that while so engaged a glass broke and one of the pieces, in falling, struck his wrist. The negligence charged was failure of appellee to warn the appellant of the dangers of the employment, and in neglecting to supply appellant with leather gauntlets for the protection of his arms and wrists. It was held that appellant assumed the risks of employment.

in allowing a man to pass under the building for the purpose of greasing machinery. It had been abandoned for that purpose long before the injury for which this suit was brought, and had been covered with thin boards and two pieces of iron, each one-half inch thick, four and one-half inches wide and about five feet in length. On March 16, 1888, the appellee, who was a minor, with several men, was engaged in removing a cog-wheel, weighing something over 2,000 pounds, from the machine shops to one of the appellant's buildings. In doing so they were compelled to pass over the pit above named. In attempting to cross the pit the iron slipped apart, being in no way secured or fastened, the plank gave way, and the iron bent under the weight of the cog-wheel, by reason of which one wheel of the truck upon which it was being transported was precipitated into the pit, throwing the cog-wheel upon the appellee's foot and ankle, injuring him severely. He testified that he knew of the existence of the pit, but was ignorant of the fact that it was dangerous, not knowing that the iron with which it was covered was in no way fastened or secured.

"Under these facts we think it was the proper course to submit to the jury, under proper instruction from the court, the question as to whether the appellant had been guilty of negligence resulting in the injury sustained by the appellee, as well as the question as to whether the appellee was free from contributory negligence. The rule is that where a state of facts and circumstances exists from which one sensible, impartial man would infer that proper care had not been used, and that negligence existed, while another man equally sensible and equally impartial would infer that proper care had been used, and that there was no negligence, the question of negligence must be referred to the jury under proper instructions from the court. Ohio, etc., R'y Co. v. Collarn, 73 Ind. 261; Rogers v. Leyden, 127 Ind. 50; Balt., etc., R. Co. v. Walborn, 127 Ind. 142." \* \* \* [See these cases reported with the Indiana cases in this volume of AM. NEG. CAS., post.]

EMPLOYEE KILLED BY FALL OF STONE IN STONE YARD—DANGEROUS WORKING PLACE—NOTICE—INSUFFICIENCY OF COMPLAINT. — In SALEM-BEDFORD STONE CO. v. HOBBS, ADM'R, 144 Ind. 146 (*November Term, 1895*), employee, a "hooker" in defendants' stone-quarry yard killed by the fall of a stone, judgment for plaintiff in the Lawrence Circuit Court for \$5,000 was reversed for insufficiency of the complaint. The court (per McCABE, J.) stated the case as follows:

"It appears from the second paragraph of the complaint that the

appellant was operating a stone yard in connection with its stone quarry, steam stone saw mill, engine, derricks, or traveling derricks, or travelers on a tramway; that the derrick, called a traveler, was used to raise and move blocks of stone over and around the stone yard; that appellant had piled blocks of stone in this yard in miscellaneous heaps of irregular shapes and sizes in lengths and width, piled upon loose earth and dirt mixed with spalls or small pieces of broken stone, and which, it is alleged, the appellant had carelessly and negligently failed to prop or stay said stone, or any of them; that it had carelessly and negligently placed a large stone nine feet long and five feet wide and fifteen inches thick on its edge, each end resting on two small irregular stones, which were placed on loose dirt, and that said large stone was in no manner propped or stayed so that the employees of the company could work safely around and about it, and that said stone so situated and placed rendered the place dangerous and unsafe to defendant's employees, and had been allowed to so remain for three months prior thereto; that the employment of deceased was to work in said stone yard as a hooker, whose duty, in connection with another employee, was to fasten or hook the hooks called dogs attached to the derrick onto blocks of stone in said yard in order to raise them. And that while attempting to hook onto another stone, said large stone, so setting on its edge, fell over on him, causing his death, without any fault on his part; that he left a widow, etc.

"The foregoing is substantially the same as the first paragraph on which the case was tried, but owing, presumably, to the suggestion of the Appellate Court (1), the second paragraph was added,

1. See SALEM-BEDFORD STONE CO. v. HOBBS, ADM'R, 11 Ind. App. 27, for the decision in the Appellate Court. Referring to this decision, the Supreme Court, in the case at bar, said (per McCABE, J.): The appellee, as administrator of the estate of James F. Hobbs, deceased, sued the appellant in the Circuit Court, in a complaint of but one paragraph, for negligence in causing the death of said decedent. A trial of the issues joined resulted in a verdict and judgment against appellant for \$1,750, which judgment, upon appeal to the Appellate Court, was reversed because the evidence did not support the verdict, that court holding that the evidence showed that the danger from

which the decedent's injury resulted was one which was incident to the service in which he was engaged and the risk of which he had assumed in his contract of employment. On the return of the cause to the Circuit Court, the complaint was amended by filing a second paragraph, presumably to meet a suggestion made in the opinion of the Appellate Court that the action could only be maintained by alleging and proving that "the proximate cause of the injury was a latent or concealed defect or imperfection, which might, on reasonable inspection, have been discovered by appellant."

The cases cited in the case at bar are reported with the Indiana cases in this volume of AM. NEG. CAS., *post*.

differing from the first in some averments as to the dirt on which the stone rested, the substance of which is as follows: That said small stones rested on loose-made earth, liable to press down on one side and allow said unpropped stone to fall over; that the dangerous condition of said smaller stone could not, without close inspection, be seen by the employees working about it, for the reason that said dirt was hidden from view and appellant negligently failed to inspect the earth and condition of said smaller stones upon which said larger stone rested, and had it done so it could readily have known that said stone so situated was in danger of falling over.

"The hidden or concealed defect or imperfection about the unpropped stone, for the absence of which the Appellate Court adjudged that the risk was one incident to the employment and was assumed by the decedent, was attempted to be supplied by the above averments about the loose new-made earth or dirt hidden from view.

"Whether that has been successfully done depends on the following allegations: 'That \* \* \* deceased, while in the line of his duty \* \* \* without any knowledge of the dangerous condition of said stone, the smaller stones upon which it rested and the dirt beneath, and without being able to see the condition of the earth beneath said stones, attempted to hook onto another stone near by in obedience to the order of the company, then and there given him, and while his face was turned in another direction, the said large stone so resting upon said smaller stones suddenly fell over on and against decedent, so bruising and mangling him that in twelve hours thereafter he died.'

"There is no allegation here that the new and hidden or concealed element, namely, the loose new-made earth, had anything whatever to do with the large stone falling over on the deceased. Nor is there any allegation anywhere else in the paragraph conveying such an idea. It is only by the most liberal construction of the language just quoted that it can be said to convey the idea that the decedent was ignorant of the loose new-made earth. Indeed, the averment is that that was the condition of the whole yard under all the stones piled therein without alleging his ignorance of that fact. But extending the most liberal intendment to the language quoted so as to ascribe to it the meaning that the deceased was ignorant of the loose-made earth under this particular stone, yet the existence of such loose dirt and his ignorance thereof does not help the pleading any, unless such soft dirt had some effect in causing the stone to fall over. The averment that it was liable to cause it to fall over is not sufficient unless it in fact did cause it to fall over. That act is not alleged.

"Therefore, the pleading stands as if there was no allegation in it about the loose new-made earth or dirt. That element being eliminated, it appears that the deceased knew as much as his employer about the danger from which he was injured. That is, he knew that stones were piled in miscellaneous heaps on loose dirt in the yard, and that they were unpropped, and that the stone which fell on him was five feet wide, nine feet long and fifteen inches thick, was standing in the yard on its edge and that it had been so standing for some length of time. Whether he knew it had been standing in that condition three months is not stated. Common sense would teach any man that such a stone in such situation would be liable to fall over. Enough is disclosed in the paragraph to show that there were other dangers of the same class incident to the employment in which the decedent was engaged." \* \* \* [Citing Evansville, etc., R. Co. v. Duel, 134 Ind. 156; Louis., etc., R. Co. v. Corps, 124 Ind. 427.]

"It may not be necessary, in all cases, to make a good complaint by a servant against his master, for an injury sustained by the servant through his master's negligence, while engaged in such master's service, to deny in the complaint the assumption of the risk by the servant, or to aver that the risk was not known incident to the service. But in a case like the ones from which we have quoted and the one now before us, where the facts set forth in the pleading strongly tend to show that the danger from which the injury complained of resulted, was a known incident to the service, the complaint cannot be made good without a denial of the assumption of the risk in the complaint or a denial that it was a known incident to the service in which the servant was engaged when injured, if the facts and circumstances stated do not necessarily imply such denial. See Peerless Stone Co. v. Wray, 143 Ind. 574." Held, complaint not sufficient to state cause of action.

**EMPLOYEE INJURED BY FALL OF STONE SLAB IN QUARRY—VICE-PRINCIPAL—INSUFFICIENCY OF COMPLAINT.** — In REED v. BROWNING, 130 Ind. 575 (*March, 1892*), the complaint alleged that defendant was the owner and was engaged in operating a stone quarry and saw mill in Lawrence county, in which he employed a great number of men, the appellee among the number; that one Roberts was superintendent of the mill, and had charge of the workmen there employed; that the appellee was ordered by Roberts to leave the particular work in which he was engaged and to go and perform a certain other service, and that while he was obeying the order thus given, a certain

large stone slab fell upon him, crushing and greatly and permanently injuring him. Plaintiff recovered judgment in the Monroe Circuit Court which, on appeal to the Supreme Court, was reversed for defective complaint. The court (per McBRIDE, J.) said:

"The only negligence charged is that the stone was left unpropped and unsupported, but whose act this was does not appear. Assuming that Roberts was a vice-principal, and the appellant answerable for his negligence (which we do not decide), he is not charged with any negligence. All that the complaint charges that he did was to order that the stone be unloaded. It is not averred that he superintended the unloading, or directed how the stone should be placed, or left, or that he had any knowledge whatever of the manner in which it was left. There is an entire absence of averment of any fact tending to connect the appellant with the alleged negligence."

#### **Notes of cases arising out of injuries caused by falling objects, etc.**

*Employee injured by fall of clay, etc., in quarry — Notice of danger — Insufficiency of complaint.*

In **THE PEERLESS STONE COMPANY v. WRAY**, 143 Ind. 574 (November, 1895), employee, in defendant's stone quarry, injured by the fall of a large pile of clay, dirt and stone which had been loosened and left an embankment unsupported, judgment for plaintiff in the Monroe Circuit Court was reversed for insufficiency of complaint. It was held that in order to make a good complaint the averment of want of knowledge of danger on the employee's part must be as broad as the averment of knowledge on the part of the master. This the complaint failed to aver. An averment that plaintiff had no knowledge that such clay, dirt, etc., had been loosened, without alleging that he did not know it was in danger of falling, or danger in passing close to the embankment, was not sufficient, especially where it was alleged that the defendant did not notify the plaintiff that there was danger in passing close to the embankment.

*Fall of an appliance attached to steam drill — Liability.*

**SALEM STONE & LIME CO. v. TEPPS**, 10 Ind. App. 516 (May Term, 1894); employee, a "stripper" in defendant's quarry, injured by the drill leg of a steam drill which he was assisting to move falling on him; judgment for plaintiff in the Washington Circuit Court affirmed.

*Fall of large stone in quarry — Master liable.*

**BLONDIN v. OOLITIC QUARRY CO.**, 11 Ind. App. 395 (November Term, 1894); employee, a stone dresser in defendant's quarry, injured by a stone standing on edge falling over and striking his leg; judgment for defendant on special verdict (although the jury found damages for plaintiff for \$1,000) in the Jennings Circuit Court was reversed, with directions to court below to render judgment for plaintiff on verdict for \$1,000.

*Carpenter injured by fall of slate from roof of building being constructed — Owner of building liable.*

**DEHORITY v. WHITCOMB**, 13 Ind. App. 558 (May Term, 1895); employee, employed as a carpenter upon a building of defendant's in course of construction, injured by the fall of a large quantity of slate from the roof which crushed

plaintiff's right leg, broke his ribs and fractured his skull; judgment for plaintiff in the Madison Circuit Court affirmed; the relation of master and servant existed between defendant, the owner of the building, and plaintiff, a carpenter of the force of the contractor employed to do carpenter work, where the defendant paid the latter for the men employed and directed and controlled them.

*Carpenter injured while assisting to place timber in position — Dangerous place.*

**ROMONA OOLITIC STONE Co. v. TATE,** 12 Ind. App. 57 (November Term, 1894); carpenter, employed in the construction of a wooden building as a part of defendant's stone mill, assisting to put into position a large timber which was being raised by a derrick, injured by his foot catching between some iron frames which slipped when plaintiff stepped upon same while moving the said timber; dangerous place to work; judgment for plaintiff in the Owen Circuit Court reversed, on the ground that the evidence failed to show any neglect on defendant's part owing from it to plaintiff or that plaintiff was himself free from fault; petition for rehearing overruled.

*Fence blown down by wind and striking employee — Knowledge of danger — Master not liable.*

In **THE DIAMOND PLATE GLASS COMPANY v. DE HORITY,** ADM'R, 143 Ind. 381 (November Term, 1895), employee, engaged in shoveling dirt, etc., from defendant's factory grounds near a high fence, killed by a large, heavy wooden fence falling upon him, the fence being blown down by the wind, judgment for plaintiff on general verdict in the Henry Circuit Court for \$4,000 was reversed, as the deceased was shown to have had as good an opportunity to know of the danger as the defendant. Where there is a conflict between the special findings and the general verdict, the statute requires the court to treat the special finding as true, and the general verdict to the extent of such conflict as untrue and to hold that the former shall control the latter, and give judgment accordingly.

*Employee injured by cave-in — Falling earth — Assumption of risk.*

In **VINCENNES WATER SUPPLY COMPANY v. WHITE,** 124 Ind. 376 (May Term, 1890), laborer, engaged in digging ditch leading to stand-pipe, injured by cave-in, and leg broken by falling earth, judgment for plaintiff in the Knox Circuit Court was reversed, the danger being one of the risks of employment.

**RAILSBACK v. PRESIDENT & DIRECTORS OF THE WAYNE COUNTY TURNPIKE Co.,** 10 Ind. App. 622 (May Term, 1894); employee, directed to drive into gravel pit and load his wagon, injured by cave-in of bank of pit and large quantity of earth falling and breaking his leg; assumption of risk; judgment on demurrer to complaint affirmed.

**Employees injured while loading and unloading cars, etc.**

*Collision between freight and coal cars — Employee killed while unloading coal car — Assumption of risk.*

In **HOOSIER STONE Co. v. McCAIN,** ADM'R, 133 Ind. 231 (November Term, 1892), employee directed by defendant's superintendent to assist in unloading coal from a car standing on switch track, which coal was for use in defendant's stone quarry, killed by being thrown from car by other freight cars colliding with it, judgment for plaintiff in the Lawrence Circuit Court was reversed and petition for rehearing overruled, the Supreme Court, after a full discussion of the facts, holding that the evidence tended to show that the injury was the result of an accident attributable to the risks of the service.

*Collision between coal cars which were being loaded — Defective cars — Fellow-servant.*

In *NEUTZ v. JACKSON HILL COAL & COKE CO.*, 139 Ind. 411 (November Term, 1894), employee, engaged in loading cars from coal shed, injured in collision between cars, caused by defective cars and appliances, judgment for defendant in the Sullivan Circuit Court was affirmed, and petition for rehearing overruled, the fellow-servant rule being applied.

*Employee hauling clay in mill thrown from freight car.*

In *BURNS v. WINDFALL MANUFACTURING CO.*, 146 Ind. 261 (November Term, 1896), employee, hauling clay in defendant's tile mill, injured while riding on car which stopped suddenly and threw him to the ground, defective track being alleged, judgment for defendant on demurrer affirmed, the complaint being insufficient.

*Employee injured by log being rolled against him by another employee.*

In *HELFRICH ET AL. v. WILLIAMS*, 84 Ind. 553 (November Term, 1882), employee, handling logs in defendant's saw mill, injured by log being rolled against him by another employee not in the same line of employment, judgment for plaintiff in the Vanderburgh Circuit Court was reversed, the complaint being insufficient to show cause of action.

*Master liable for injury caused by incompetent servant.*

In *INDIANA MANUFACTURING CO. v. MILLICAN, ADM'R*, 87 Ind. 87 (November Term, 1882), employee killed by negligence of a co-servant employed to assist him in off-bearing lumber, judgment for plaintiff for \$1,200 in the Miami Circuit Court was affirmed, the master being liable for failing to use reasonable care in the selection of servant.

## THE NEW PITTSBURGH COAL AND COKE COMPANY V. PETERSON.

*Supreme Court, Indiana, November Term, 1893.*

[Reported in 136 Ind. 398.]

**FELLOW-SERVANTS.** — Servants owe to the master a diligent and watchful care over his business, and they owe to each other a vigilance and caution for their own safety, and the master should not be liable for their neglect of the duty they owe to each other, unless he continues them with knowledge of their faithlessness.

**VICE-PRINCIPAL.** — In every case the position of vice-principal must be determined by ascertaining whether the act performed or duty omitted is one the doing of which is charged upon the master and delegated to the servant, and the master is liable for injury resulting from such act or omission, if the injured servant is free from negligence and has not assumed the hazard.

**BURDEN OF PROOF.** — The burden rests upon the injured servant to show, by his complaint, that some duty of the master has been violated, and if that duty is one the discharge of which has been delegated to another, not only the duty but the delegation of it, as well as its violation, must be shown.

**EMPLOYEE INJURED BY BEING DRAWN INTO ELEVATOR BELT — FELLOW-SERVANT — VICE-PRINCIPAL — COMPLAINT — PLEADING.** — In an action to recover damages for injuries to an employee who, while cleaning defendant's slack elevators, under direction of another employee, was drawn into the guide of the elevator belt and buckets by reason of alleged negligent putting of machinery in motion, where it was alleged that such other employee was defendant's agent with power to employ and discharge workmen, including plaintiff, and to control defendant's works, but it clearly appeared that plaintiff and he were serving the same common master, in the same common pursuit, to accomplish the same common object, it was held that the allegations of the complaint were not sufficient to establish the relation of vice-principal by the alleged negligent employee, and judgment for plaintiff was reversed (1).

**APPEAL** from the Sullivan Circuit Court. The facts appear in the opinion. *Judgment reversed.*

J. S. BAYS, for appellant.

W. C. HULTZ and G. G. RILEY, for appellee.

**Hackney, J.** — The appellee sued the appellant in the court below for personal injuries and recovered judgment for \$5,000. His complaint was in four paragraphs, the first of which was, in substance, as follows:

The appellee was employed to do general work in and about the appellant's coke yards, and to haul away ashes and other refuse, haul slack and clean the yards, from July 30, 1888, to and including February 19, 1889; that he was inexperienced in working with machinery, as the defendant well knew; that on said last-named day, one Gus Lawrence was defendant's agent to employ and discharge its workmen, including the plaintiff, and to control their work; that said Lawrence negligently directed the plaintiff to clean certain of defendant's slack elevators, and the place of performing such work was dangerous, in that it became necessary to stand close to the machinery of the elevator, and upon the buckets thereof, and that if the machinery was put in motion while he was so occupied, injury was sure to follow, of which dangers said defendant well knew; that plaintiff entered

1. On a subsequent appeal in the *PETERSON* case, in the Indiana Appellate Court, in the November Term, 1895, the judgment for plaintiff was again reversed, it being held error to overrule demurmer to the amended complaint. See *NEW PITTSBURGH COAL & COKE CO.* *v. PETERSON*, 14 Ind. App. 634.

*Fall of elevator in factory.* — In *GEORGE H. HAMMOND & Co. v. SCHWEITZER*, 112 Ind. 246 (May Term, 1887), employee injured by fall of elevator in defendant's factory, judgment for plaintiff in the Lake Circuit Court was affirmed.

upon the work so assigned, in the presence and under the direction of said Lawrence, and "reposed confidence in the prudence and caution of the defendant, and that defendant would notify him of the starting of the machinery, so that he could remove" from its dangers; that while so engaged, and without notice or warning, the defendant negligently put the machinery in motion, whereby plaintiff, without fault or negligence on his part, was drawn into the guide of the elevator belt and buckets, and sustained the injuries complained of.

The second paragraph varies from the first only in alleging that the plaintiff's employment was special, in that it was to haul slack, clean the yard and haul ashes and other refuse, and that he was inexperienced and unacquainted with the use of said machinery and ignorant of the dangerous character of the work.

The third paragraph is, in effect, the same as the second, excepting that it alleges that the plaintiff was directed to perform said service near the time for starting the machinery in motion, and that the defendant knew, or by ordinary care could have known, of the nearness of the time for starting said machinery, and that it would start while plaintiff was so engaged, and of his dangerous situation.

The fourth paragraph differs from the first only in alleging in addition to the facts contained in the first, "that the place furnished the plaintiff to work in was not a safe place, but was extremely dangerous in this, that death or great bodily harm was sure to result to one who occupied the place so assigned the plaintiff, when the machinery was in motion, and "that plaintiff did not know the proximity of the time for starting said machinery." This paragraph, however, does not allege negligence in the starting of the machinery, or that it was started by the defendant or his servants.

In considering the sufficiency of this complaint, it is essential that we keep in view the theory upon which it proceeds; in other words, the duty of the master for the violation of which a recovery is claimed. The master is not charged with supplying improper, imperfect or unusual machinery for the purposes in which it engaged the servants operating the mill, nor is it alleged that there was any negligence in employing or retaining in the service ignorant, unskilled or habitually negligent servants, nor is it an element of the cause of action, that the master failed to adopt proper rules for the government of its servants, nor that

the machinery was started in violation of such rules as to the time or manner thereof.

The necessary conclusion is that the injury complained of was the result of negligence in not delaying the starting of the machinery while Peterson was in the elevator. We are not to presume that the engineer knew of Peterson's situation when he started the machinery, nor can we presume that he started the machinery at an unusual time. More briefly stated, it is not for us to presume that the engineer acted wilfully or negligently.

The only negligence charged is that of Lawrence. If he was a fellow-servant of Peterson, and not a vice-principal, all of the paragraphs of complaint were bad. The allegation of Lawrence's relation to the master, as we find it in every paragraph, was that one Gus Lawrence was defendant's agent, with full authority "to control the work of, and to employ and discharge the plaintiff from his employment, as well as other servants of said defendant."

Whether Lawrence was a vice-principal in performing the service in which his negligence caused the appellee's injury, must be determined from this allegation, in the light of the authorities. But for this allegation it clearly appears that the appellee and Lawrence were serving the same common master, and were engaged in the same common pursuit, in accomplishing the same common object, and were, therefore, fellow-servants.

The questions of rank and of power to employ and discharge servants are not controlling in the consideration of the relation of Lawrence to the appellant. *Justice v. Penn. Co.*, 130 Ind. 321. As there said, in effect, the controlling consideration is whether the act or omission is one arising from a duty owing by the master to the servant, the discharge of which duty is entrusted by the master to the negligent servant.

In *Brazil & Chicago Coal Co. v. Cain*, 98 Ind. 282, the complaint alleged that Hopkins was the master's "bank-boss, and, as such, had charge of its coal mine and control of the men working therein, and it was his duty to look after, care for, and superintend said mine and the entire workings therein, and to secure and keep the rooms, entrances and openings of such mine in a safe condition." This was held insufficient to charge the master with the negligence of Hopkins as a vice-principal. This case has been followed with approval in numerous cases, including *Indiana Car Co. v. Parker*, 100 Ind. 181, 14 Am. Neg. Cas.

422, *ante*; Pittsburgh, etc., R'y Co. v. Adams, 105 Ind. 151; Lake Shore, etc., R'y Co. v. Stupak, 108 Ind. 1; Indiana, etc., R'y Co. v. Dailey, 110 Ind. 75; Cincinnati, etc., R. Co. v. McMullin, 117 Ind. 439 (1).

The most that can be claimed for the allegations of the complaint before us, upon the question under immediate consideration, is that Lawrence was the master's foreman as to the labors of Peterson and others of the master's employees.

That a foreman may be, and that he is, ordinarily but a fellow-servant is very fully discussed in Indiana Car Co. v. Parker, 100 Ind. 181, 14 Am. Neg. Cas. 422, *ante*, where many of the cases on the subject are reviewed. In that case the distinction is clearly made between cases where the service of the foreman or other employee of superior rank involves the performance of some duty owing by the master to his servants, as in the supplying of proper machinery or safe places to work and those cases where the duty violated is one, not of the master, but of one servant to another engaged in one common employment. There some of the cases cited by the appellee in this case are reviewed and their application to a case not involving a duty of the master is denied. So it may be said of all other cases cited by the appellee in this case. They involve authority from the master to the foreman to supply proper machinery and safe working places, duties clearly owing by the master and which could not be so delegated as to absolve him from liability.

In cleaning the elevator, the appellee and Lawrence were discharging a duty owing from both to the master, and they were necessarily fellow-servants. The negligence of Lawrence in failing to prevent the starting of the machinery is not shown to have been the omission of a duty expressly or impliedly delegated to him by the master.

In every case the position of vice-principal must be determined by ascertaining whether the act performed or duty omitted is one the doing of which is charged upon the master and delegated to the servant. In other words, whether the servant has been put in the place of the master as to the particular service performed or omitted. If he has, and his act or omission, while in that particular service, involves a duty owing by the master to the servant, the master is liable for injury resulting from such

1. See the cases cited, reported with the Indiana cases in this volume, *post*.

act or omission, if the injured servant is free from negligence and has not assumed the hazard.

In *Spencer v. Ohio, etc., R'y Co.*, 130 Ind. 181, Spencer was directed, by one under whose orders he was required to work, to clean a locomotive, and while engaged in the task, under the boiler, the engineer started the locomotive and ran upon him. It was there said: "If there was negligence on the part of the employees of the company, either in ordering him to clean the engine, or of the engineer in starting the engine, it was the negligence of a co-employee, for which the appellee is not responsible." *Wilson v. Madison, etc., R. Co.*, 18 Ind. 226; *Gormley v. Ohio, etc., R'y Co.*, 72 Ind. 31 (1); *Ewald v. Chicago, etc., R'y Co.*, 70 Wis. 420; *Pease v. Chicago, etc., R'y Co.*; 61 Wis. 163; *Bergstrom v. Staples*, 82 Mich. 654.

In *Pease v. Chicago, etc., R'y Co.*, 61 Wis. 163, is quoted with approval, from *Heine v. Chicago, etc., R'y Co.*, 58 Wis. 528, as follows: "The fact that the negligent employee has the power to direct and order the acts and movements of the one injured does not take the case out of such [fellow-servant] rule."

The case of *Bergstrom v. Staples*, 82 Mich. 654, makes distinction between cases where injury is the result of imperfect or insufficient machinery rendering the place of service dangerous, and cases where the service is hazardous because of those dangers which are necessarily incident to use of proper machinery, and the case may be regarded upon the construction we have given the complaint before us.

The case of *Ell v. Northern Pac. R. Co.*, 12 L. R. A. 97 (1 N. D. 336, 48 N. W. 222), is a very instructive case, and holds the fellow-servant rule not to depend upon the rank of the negligent servant, but upon the fact as to whether the duty omitted is one owing from the master to the injured servant, and one the discharge of which the master has conferred upon the negligent servant. There the negligent servant was in control of the men and the work, with authority to direct and supervise, and power to employ and discharge. The negligence was in failing to block a long pile which was being removed from a car upon skids, the foreman having knowledge that, to omit such blocking, one end of the pile would slide faster than the other, and, in doing so, fall between the skids where the injured servant was working. The foreman was held to be a fellow-servant of the injured employee.

i. The Indiana cases cited are reported in this volume, *post*.

The fellow-servant rule is founded in wisdom, and any departure from it is dangerous to the prosperity and perpetuity of the enterprises of manufacturing, mining, railroading, and those industries requiring the services of many servants. More than this, it increases the dangers to such servants who may be so employed. When the master has supplied a safe place to work, has employed skilful and diligent servants, and has furnished suitable and safe appliances with which to perform the service, it is a rare instance in which he is liable for injuries to his servants. The servants owe to the master a diligent and watchful care over his business, and they owe to each other a vigilance and caution for their own safety. The master should not be held for the consequences of their unfaithfulness to him, unless he continues them with knowledge of their faithlessness. The master should not be liable for their neglect of the duty they owe to each other, for that is by no fault of his. The rule which deprives them of compensation for injuries sustained from the neglect each of the other, inspires that care and diligence, in the discharge of their duties, both to the master and to themselves, which is essential to the welfare of the master and the safety of each other. When the rule is destroyed, its inducement to care is gone, and the master, if not liable for the fault of his servants as between themselves, has servants whose duties require no care excepting that each shall look to his own safety.

Where it does not appear that the master has violated a duty owing to his servant, there is not, and should not, be any liability by the master. The burden must rest upon the injured servant to show, by his complaint, that some duty of the master has been violated. If that duty is one the discharge of which has been delegated to another, not only the duty but the delegation of it, as well as its violation, must be shown.

The complaint before us fails to plead facts taking the case out of the general rule. Nothing is alleged from which we can infer a breach of duty by the master or by one standing, by authority, in the place of the master, in the performance of any duty owing by the master.

We conclude, therefore, that the allegations of the complaint are not sufficient to establish the relation of vice-principal by Lawrence, the alleged negligent servant.

The judgment of the Circuit Court is reversed. Petition for rehearing overruled.

BLACKSMITH MAKING REPAIRS ON PUMP IN MINE SHAFT INJURED BY FALLING DOWN UNPROTECTED SHAFT.—LIABILITY OF MINE OWNER—STATUTE.—In **THE BRAZIL BLOCK COAL COMPANY v. HOODLET**, 129 Ind. 327 (*May Term, 1891*), blacksmith in defendant's employ ordered to make repairs on a pump in the shaft of defendant's coal mine, injured by slipping and falling into the mouth of the shaft and to the bottom thereof, a distance of nearly one hundred feet, the top of the shaft not being protected by gates as required by law, judgment for plaintiff in the Clay Circuit Court was *affirmed*. The Supreme Court (per McBRIE, J.) discussed, at some length, the rule as to assumption of risks by employees, and cited numerous authorities thereon, the principal points being as follows:

"The law is well settled that a servant assumes all the ordinary and usual risks of the business upon which he enters, so far as these risks are known to him, or could be readily discernible by a person of his age and capacity, in the exercise of reasonable care. This is true, even though the duties of the service may be from their nature necessarily hazardous."

"It is also settled law that, notwithstanding the continuing duty resting upon the master to provide for his employees suitable and safe places and appliances for their work, the employee who voluntarily continues in the master's service after notice of defects in tools, machinery, or other appliances which augment the danger of his service, thereby assumes the risk as increased by the defect, unless the master expressly or impliedly promises to remedy the defect. **Indianapolis, etc., R'y Co. v. Watson**, 114 Ind. 20, and authorities there cited" (1).

"When a servant enters upon an employment which he knows is hazardous, either by reason of the nature of the employment, or because of defective or otherwise dangerous appliances, he may well be said to assume this risk. Knowing when he solicits and accepts the employment that if it is given him he must use defective tools, he contracts to take that as one of the risks of the service. Whether anything is said of the dangerous character of the employment, or of the defective and dangerous appliances or not, if the dangers and defects are of such character that they are equally known to or open to the observation of both employer and employee, it can well and justly be said they stand on a common footing. Acceptance of the employment is an acceptance of the attendant risk."

"The risks thus impliedly assumed by the employee are the usual risks fairly incident to his service, whether that service is rendered

1. Reported with the Indiana cases in this volume, *post*.

specially hazardous by the use of defective appliances or not. He does not necessarily assume all the risks incident to the business carried on by the employer, but only such as are connected with, and incidental to, his employment. There may be many risks connected with or growing out of the business carried on by the employer which the employee cannot be said to assume. The appellee was employed as a blacksmith. His duties, as stated in the complaint, were to "shoe the mules and horses connected with the mining business of said company, to sharpen coal-picks and other tools of the miners, as well as other work, when required by said defendant." His employment being as a blacksmith, the other work referred to, but not enumerated, will be presumed to have been other work as a blacksmith. All of the usual hazards incident to such employment were assumed by him when he entered the service. If, by reason of defective tools, or other appliance used in his said employment, the hazard was increased, he, by voluntarily remaining in the service without sufficient excuse, would assume the increased risk. He did not, however, impliedly assume risks not connected with his work.

"For instance, if, by reason of the master's negligence or failure to furnish proper appliances to be used by the miners in dislodging the coal in the mines, additional hazard attached to that part of the business as carried on, it could not be said that the blacksmith impliedly assumed such additional hazard, any more than it could be said that the miner, whose duty required him to delve, with pick and drill, in the mine, impliedly assumes any additional hazard caused by defective appliances around the blacksmith's forge. This is true, notwithstanding the fact that the miner's duty, or his master's command, may occasionally require him to visit the blacksmith's shop, and the blacksmith's duty or the master's command may occasionally call him into the mines." \* \* \*

"In this case the appellee was ordered to go to a certain place, and do certain work. To reach the place where the work was to be done it was necessary to use the unprotected shaft. The fact of its unprotected condition was equally open to the observation of both. The appellee obeyed the order, and, while returning and walking past the mouth of the open shaft, was injured because the shaft was not protected. In our opinion the risk arising from the neglect of the appellant to provide gates for the mouth of the shaft was not one of the risks assumed by the appellee when he entered the service, and we cannot say, from the averments of the complaint, that he was necessarily negligent in obeying the order. When a master orders a servant to do something which involves encountering a

risk not contemplated in his employment, although the risk is equally open to the observation of both, it does not necessarily follow that the servant either assumes the increased risk, or is negligent in obeying the order. If the apparent danger is such that a man of ordinary prudence would not take the risk, the servant acts at his peril. But unless the apparent danger is such as to deter a man of ordinary prudence from encountering it, the servant will not be compelled to abandon the service, or assume all additional risk, but may obey the order, using care in proportion to the risk apparently assumed, and if he is injured the master must respond in damages.

"It being the duty of the master to use ordinary care to provide for his employees a safe place to work, with safe tools and appliances for such work, the servant may, in such a case, assume that the master is mindful of that duty; that he has superior knowledge of the facts, and will not wantonly expose him to unnecessary peril. There are acts which are negligent *per se*, but we cannot say that walking past the mouth of an open shaft is one of them. In our opinion the complaint states a good cause of action." \* \* \*

**EMPLOYEE INJURED BY DESCENDING CAGE IN COAL MINE — DANGEROUS PLACE — STATUTORY LIABILITY — NEGLIGENCE OF FELLOW-SERVANT.** — In **RUSH v. THE COAL BLUFF MINING COMPANY**, 131 Ind. 135 (*April, 1892*), employee injured while working in defendant's coal mine, judgment for defendant in the Vigo Circuit Court was *affirmed*. The facts of the case are stated in the opinion by OLDS, J., as follows:

"We do not think it can reasonably be inferred from the evidence introduced that the appellee was guilty of any negligence which caused the injury to the appellant. There was a shaft, or passage, leading from the surface, a distance of some one hundred and twelve feet below, and into the mine, constituting the way of ingress and egress to and from it, and through which the men were lowered to the mine in the morning, and lifted from the same in the evening, and through which the coal was elevated to the surface. This was operated by two cages, as they are termed, elevated and lowered by steam power, one being at the top when the other is at the bottom, passing each other midway as the one is lowered and the other is hoisted. They were used to lower the men to the mine, and to raise them from the same, as well as to elevate the coal from the mine to the surface. The coal, at the time of the injury, was being mined some distance from the bottom of the shaft, and there were entries leading in a north and south direction from the bottom of

the shaft some distance to the various points where the men were at work in the mining of the coal. There was a passageway in the mine, around the shaft, starting in about thirty feet upon the one side and coming out about the same distance on the other, where the workmen could pass from one side of the mine to the other around the shaft in safety. At the bottom of the shaft there was a division rail, or post, extending upward on each side, in the center of the shaft, at the sides, separating the two cages as they passed up and down, and the bottom of the shaft on which the cages rested when down was about two feet lower than the bottom of the mine, so that when the cages were being operated, and were on their passage from top to bottom, and *vice versa*, there was the division part and depression to designate the point where the shaft was located. The appellant was a brick mason by trade, and had never worked in or been in a mine until employed by the appellee. He went into the mine on Saturday, and was shown to his work, and worked during the day, and came out in the evening. The point where he worked was some distance from the shaft. There were no lights in the mine, except those used by the miners on their caps, and such light as shone through the shaft. On light days there was some light cast through the shaft to the bottom, giving some light in the immediate locality of the shaft. On Saturday appellant was shown his place to work, a boss came to him two or three times during the day, and on one occasion inquired as to his name, and took it down, and directed him to heed no person but him. On Monday morning the appellant returned to his work. He was lowered to the mine through the shaft, as he had been on Saturday. His boss was not at the surface when he went there, and but two or three others went into the mine at the time he did. When he reached the mine his boss was not there; he made inquiry for him, and not finding him, according to his own testimony, he thought he could find his place to work without a guide, and undertook to do so on his own responsibility. After going some distance, which he estimates as near a fourth of a mile, and meeting several persons, and inquiring for his boss, he was informed that he was astray, and that his boss worked on the other side of the mine. He then made his way back to the shaft. On his way to the opposite side of the mine, when he reached the shaft, there were several persons standing by it, probably upon the opposite side, with lighted lamps upon their caps; his lamp was also lighted. He testified that he knew the shaft was there, and undertook to walk directly across it, and when under one of the cages, as it was being lowered, it came down upon him, injuring him very seriously. He must have stepped down

into the bottom of the shaft, which the evidence shows to be some two feet below the bottom of the passageway, or mine, though he testifies that he had no knowledge of stepping down into it. The appellant had been let down into the mine, through the shaft, on Saturday morning, and lifted from the same in the evening, and again let down on Monday morning but a short time previous to the injury. There were no lights in the mine, except lighted lamps on the caps of the miners. Instead of waiting and being shown to his work in the mine, he says he thought he could find the place, and undertook, of his own volition, to do so. The miners were only accustomed to return to the shaft in the evening, when they ceased work, to be lifted to the surface. The appellant, failing to find his place to work, returned to the shaft. He knew when he reached it, and carelessly walked in under the cage as it was being lowered. He must have known the use made of the shaft and the cages, the manner in which the cages were hoisted and lowered. Knowing he was at the shaft, as he says, he was required, if he attempted to cross the shaft at all, to observe the cages, and do so when he could avoid danger, to use care proportionate to the known danger; but he gave no heed to the situation, and undertook to cross, and received the injury.

"Section 5467, R. S., 1881, provides that the owners of coal mines shall cause to be cut in the side of every hoisting shaft, at the bottom thereof, a traveling-way sufficiently high and wide to enable persons to pass the shaft in going from one side to the other, without passing over or under the cage, or other hoisting apparatus. There was such a traveling-way around this shaft. The law requiring such a way to be made for the benefit of the men who work in the mine, there would be some reason in holding that the appellant knew that such a way was required by law, and that it was his duty, if he desired to cross from one side of the mine to the other, to seek such traveling-way, and pass through it; and that if he attempted to cross over or under the cage he did so at his peril, though it is not necessary to go to the extent of holding this to be the law in this case, for even if the appellant had the right to cross under the cage, he was bound to use due caution and care proportionate to the danger in attempting to do so, which he did not; but on the contrary, knowing he was at the shaft, he carelessly and negligently attempted to cross under the cage without giving any heed whatever to the situation or danger. *City of Richmond v. Mulholland*, 116 Ind. 173, and authorities there cited.

"There is some evidence to show that the cagers who worked at the bottom of the shaft loading the coal to be lifted could call to

persons attempting to cross, and warn them of their danger, and upon some occasions they did so; but if this be true, and the cagers neglected to warn the appellant, it will not create a liability on the part of the appellee. The law does not contemplate that employees working in a mine should cross over or under the cage. It has made provision for a passageway around the shaft, where they may pass in safety. The cagers are not placed there as watchers to warn passers-by of their danger, as watchmen are placed at railroad crossings. They are placed there to perform other labor, the loading and unloading the cages as they are lifted up and down. There is no evidence that they even saw the appellant approaching; and even if they neglected a duty, it was but the negligence of a fellow-servant, for which the appellee would not be liable. *Brazil, etc., Co. v. Cain*, 98 Ind. 282. There is no error in the record. Judgment affirmed with costs."

#### Notes of cases arising out of accidents in coal mines.

*Employee injured by fall of roof in coal mine — Dangerous condition — Owners liable.*

*ROGERS ET AL. v. LEYDEN*, 127 Ind. 50 (November Term, 1890), employee, in coal mine, injured by the fall of an overhanging part of the roof of the mine, the unsafe condition of the mine being known to the owners, judgment for plaintiff in the Gibson Circuit Court was affirmed. The court reviewed the numerous Indiana authorities relating to the duties of master and servant.

*Employee passing through passageway struck by falling slate from roof — Owners liable.*

*PARK COUNTY COAL CO. v. BARTH*, 5 Ind. App. 159 (May Term, 1892); coal miner injured by the falling upon him of a large piece of slate from the roof of the passageway through which he was passing; duty of employer to furnish safe place to work; judgment for plaintiff in the Parke Circuit Court affirmed; petition for rehearing overruled.

*Employee driving coal car in mine injured by falling slate — Owners liable.*

*HANCOCK ET AL. v. KEENE*, 5 Ind. App. 408 (May Term, 1892); employee, while driving a coal car through passageway in defendant's coal mine, injured by the falling of a large piece of stone or slate; judgment for plaintiff in the Sullivan Circuit Court affirmed; injuries, right hand crushed and right ankle bruised, etc.

*Employee injured by cave-in of roof of mine.*

*HOCHSTETTLER v. MOSIER COAL & MINING CO.*, 8 Ind. App. 442 (November Term, 1893); coal miner injured by caving in of roof of mine or shaft; judgment for defendant on demurrer reversed, the complaint sufficiently showing plaintiff's freedom from contributory negligence.

*Fall of slate from roof of passageway in mine — Defective pleading.*

*LINTON COAL & MINING CO. v. PERSONS*, 11 Ind. App. 264 (November Term, 1894); miner injured by fall of slate from roof of passageway in coal mine;

judgment for plaintiff in the Greene Circuit Court for \$2,000 reversed; defective pleading; erroneous instructions on damages, etc.

*Employee killed by fall of roof of mine — Defective pleading.*

NEW KENTUCKY COAL CO. v. ALBANI, *ADM'X*, 12 Ind. App. 497 (November Term, 1894); employee fatally injured by fall of roof of coal mine; failure of complaint to allege defendant's knowledge of dangerous condition or deceased's want of such knowledge; judgment for plaintiff in the Vermillion Circuit Court reversed.

*Falling rock from roof of mine — Employee injured — Owners liable.*

ISLAND COAL COMPANY v. RISHER, 13 Ind. App. 98 (May Term, 1895); employee, working in coal mine, injured by falling rock or debris from roof of said mine; ordered by mine boss to go into room and assist in clearing up debris; employee's lack of knowledge of danger; judgment for plaintiff in the Sullivan Circuit Court affirmed; rehearing denied.

*Employee blasting coal in mine struck by coal, etc. — Erroneous instruction.*

SUMMIT COAL CO. v. SHAW, 16 Ind. App. 9 (May Term, 1896); employee in coal mine, blasting coal, struck by large lumps of coal and timber and arm, face and ribs injured; dangerous condition of a "rib" of coal on which plaintiff was working and of which he was without knowledge; judgment for plaintiff in the Greene Circuit Court reversed for erroneous instruction as to contributory negligence, etc.

MINOR EMPLOYEE KILLED BY FALL OF SLATE FROM ROOF OF MINE — FELLOW-SERVANT — CONTRIBUTORY NEGLIGENCE. — In BRAZIL & CHICAGO COAL CO. v. CAIN, 98 Ind. 282 (*May Term, 1884*), minor employee, nineteen years of age, driving mule in defendant's coal mine, fatally injured by fall of slate from roof of entry or passageway through which he was passing, judgment for plaintiff for \$1,000 in the Clay Circuit Court was reversed, and petition for rehearing overruled, the injury being caused by the negligence of a fellow-servant, and the employee having assumed the risks of danger, the master was not liable. The court (per HOWK, J.) said:

"An employee in the service of a mining company assumes the risks and dangers incident to the business in which he is engaged; and the fact that he is a minor, if he be of age sufficient and is competent for the service in which he is employed, does not affect the duty or liability of the corporation in this regard, as the risks are an element of the employment, and the employee cannot claim, on account of infancy, to be relieved from the consequences of such risks. In the case at bar the appellee does not claim in her complaint that her son did not have, notwithstanding his alleged non-age or minority, full knowledge of all the hazards of his employment. On the contrary, it appeared from the complaint that appellee's son was nineteen years of age at the time of his injury and death, and

for some time previous had been an employee of the appellant in mining coal. It must be assumed, therefore, in the absence of any showing to the contrary, that he voluntarily engaged in driving the coal cars through the avenues of the mine, with full knowledge of the dangers of the business. In such cases neither the employee nor his mother, the appellee, could legally claim that on account of his infancy the appellant should be held liable for his injury and death caused, as alleged, by the negligence of his fellow-servant. Although the appellee's son was a minor, under the age of twenty-one years, at the time he entered into the appellant's service, and at the time of his injury and death, yet it appeared that he was of sufficient age and experience to understand fully the hazard and dangers of the service, and therefore it must be held that by engaging in such service, notwithstanding his minority, he took upon himself the natural and ordinary risks incident to the business in which he engaged, among which was the negligence of his fellow-servants, whether of high or low degree, in the same common enterprise. *Gartland v. Toledo, etc., R'y Co.*, 67 Ill. 498, 14 Am. Neg. Cas. 378, *ante*; *De Graff v. New York, etc., R. R. Co.*, 76 N. Y. 125; *Houston, etc., R. Co. v. Miller*, 51 Tex. 270; *King v. Boston, etc., R. Co.*, 9 *Cush.* 112." \* \* \*

MINOR EMPLOYEE INJURED BY FALLING MATERIAL FROM ROOF OF COAL MINE—PARENT AND CHILD—INSUFFICIENCY OF COMPLAINT.—In **BRAZIL BLOCK COAL COMPANY v. YOUNG**, 143 Ind. 520 (*November Term, 1895*), action by a father for injuries sustained by his son, sixteen years of age, by reason of the falling upon him of rock and slate from the roof of defendant's coal mine in which he was working, judgment for plaintiff in the Clay Circuit Court was *reversed* for insufficiency of the complaint. It was held that "in order to show the defendant guilty of an actionable tort, the complaint should have averred one of these things: 1. That the child was too young to be put to the service he was required to perform; or, 2, that neither he nor the plaintiff had notice or knowledge of the augmented danger caused by the master's neglect; or, 3, that the master, knowing the age and inexperience of the child, neglected to give him the necessary warning and instruction." The complaint was deficient in these respects.

See also what appears to be a former decision in the Young case, namely, **BRAZIL BLOCK COAL COMPANY v. YOUNG**, 117 Ind. 520 (*November Term, 1888*), minor employee, sixteen years old, a driver in defendant's coal mine, injured by fall of slate, etc., from roof of

mine where judgment for plaintiff, father of injured employee, was reversed, the complaint being insufficient to show cause of action.

*Minor employee injured while coupling coal cars in mine.*

In *BRAZIL BLOCK COAL COMPANY v. GAFFNEY*, 119 Ind. 455 (*May Term, 1880*), minor employee, ten years of age, ordered by person in control to leave regular work and assist in switching and coupling coal cars, injured by his left hand being caught and crushed between cars, it was held that the defendant company was liable, and judgment for plaintiff in the Clay Circuit Court was affirmed. The court fully discussed the duty and liability of the master as to instructing and warning minor employees engaged in hazardous service.

**Liability of master for tort of servant resulting in injury to third persons.**

*Person not employee assaulted by gatekeeper at fair — Master and servant — Respondent superior — Pleading and practice.*

In *THE OAKLAND CITY AGRICULTURAL & INDUSTRIAL SOCIETY v. BINGHAM*, 4 Ind. App. 545 (November Term, 1891), plaintiff assaulted by defendant's gate-keeper at a fair which was being held by the defendant society, judgment for plaintiff for \$275 in the Gibson Circuit Court was reversed; held that the relation of master and servant existed between defendant and its gate-keeper and that the doctrine of *respondeat superior* applied; but to the second paragraph of the complaint, based upon the theory that defendant was bound to exercise reasonable care in the selection of a gate-keeper and for failure to do so was answerable for the wrongs of that functionary whether occurring in the line of his employment or not, it was held error to overrule demurrer to it.

*Person not employee struck by flying object — Careless act of employee — Master liable.*

In *THE WHITE SEWING MACHINE COMPANY v. RICHTER*, 2 Ind. App. 331 (May Term, 1891), person, not an employee, injured by the careless act of one of defendant's employees in removing a machine from plaintiff's house, which fell and a piece of iron struck her in the eye, judgment for plaintiff in the Marion Superior Court was affirmed.

*Traveler on highway injured by negligent blasting in quarry — Liability of master for tort of servant — Joint tort feasors.*

In *WRIGHT ET AL. v. COMPTON*, 53 Ind. 337 (November Term, 1876), action against a master and his servant for damages for injuries to plaintiff who, while traveling along the highway, was injured by large quantities of stone which were hurled against him owing to alleged negligent blasting in defendant's stone quarry, judgment for plaintiff in the Putnam Circuit Court was affirmed. It was held that the general rule is, that a master is responsible for injuries to others resulting from the carelessness or negligence of his servants, while in the performance of his master's business; that the servant is also liable for his own carelessness and negligence; and that the master and servant may be joined in the same action. [See *Evansville, etc., R. Co. v. Baum*, 26 Ind. 70.] In such case it was also held in estimating damages the jury might consider suffering and anxiety of mind caused by corporal injuries, and that such

matter of special damages need not be specially alleged. [Citing *Taber v. Hutson*, 5 Ind. 322; *Cox v. Vanderkleed*, 21 Ind. 164; *Fisher v. Hamilton*, 49 Ind. 341.]

*Collision on highway — Liability of bailor of team for negligent driving of teamster.*

In *CROCKETT v. CALVERT*, 8 Ind. 127 (November Term, 1856), where A hired his wagon, team and teamster to B, and during the bailment the team ran away and ran against C's horse, injuring him so that he died, it was held that the teamster was the servant of the bailor, and not of the bailee, and that the bailor, owning, furnishing and controlling the motive power, was liable for the injury.

## LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY COMPANY v. SANDFORD, ADM'X.

*Supreme Court, Indiana, November Term, 1888.*

[Reported in 117 Ind. 265.]

**BAGGAGE-MASTER KILLED BY FALL OF RAILROAD BRIDGE — KNOWLEDGE OF DEFECT — PLEADING DEFECTIVE.** — A complaint in an action against a railroad company for damages for the death of an employee, a baggage master on its train, caused by the fall of a railroad bridge, which alleges merely that the railroad company permitted the same to become unsafe, is defective in its omission to aver that the employee was ignorant of such unsafe condition of the bridge.

**ASSUMPTION OF RISK.** — An employee assumes all ordinary risks incident to the employment, but does not assume extraordinary risks unless he has knowledge thereof and continues in the service, in which latter case the increased danger becomes an incident of the employment, and for an injury to the employee arising therefrom the master is not liable.

FROM the Floyd Circuit Court. The case is stated in the opinion. *Judgment for plaintiff reversed.*

G. W. EASLEY, G. W. FRIEDLEY, C. L. JEWETT, H. E. JEWETT and G. R. ELDRIDGE, for appellant.

A. DOWLING, for appellee.

**Elliott, Ch. J.** — The appellee alleges in her complaint that Charles W. Sandford, her intestate, was in the appellant's service in the capacity of a baggage-master; that, on the line of the appellant's railroad, and forming part of its road, was a bridge across a stream; that, on the 24th day of December, 1883, and for a long time prior to that day, the appellant had negligently permitted the bridge to become unsafe; that the piers were weak and not capable of resisting the force of floods to which the stream was subject; that, on the 24th day of December, 1883, while the plaintiff's intestate was being carried over the road as

baggage-master, the bridge fell, and without fault on his part he was killed (1)

The complaint sufficiently shows that the plaintiff's intestate was not guilty of contributory negligence, for the general averment that he was without fault excludes the existence of contributory negligence. Evansville, etc., R. R. Co. v. Crist, 116 Ind. 446; Ohio, etc., R'y Co. v. Walker, 113 Ind. 196; Mitchell v. Robinson, 80 Ind. 281, 14 Am. Neg. Cas. 452, *ante*; Pittsburgh, etc., R'y Co. v. Wright, 80 Ind. 182.

But there is no averment that the intestate was ignorant of the unsafe condition of the bridge, and the omission of this averment presents the only difficult question arising on the demurrer to the complaint.

The general rule is that an employer must use reasonable care, skill and diligence to provide his employees with a safe working place, and that he must also make reasonably safe the machinery and appliances which the nature of the service requires his employees to use. Indiana Car Co. v. Parker, 100 Ind. 181, 14 Am. Neg. Cas. 422, *ante*; Baltimore, etc., R. R. Co. v. Rowan, 104 Ind. 188; Krueger v. Louisville, etc., R'y Co., 111 Ind. 51; Penn. Co. v. Whitcomb, 111 Ind. 212; Louisville, etc., R'y Co. v. Wright, 115 Ind. 378; Louisville, etc., R'y Co. v. Buck, 116 Ind. 566.

This rule requires a railroad company to construct and maintain the bridges which carry its rails across brooks and rivers in a reasonably safe condition. The employees enter its service under an implied contract that this duty will be performed, and, under this contract, they impliedly assume all the ordinary perils of the service. Employees assume all the ordinary risks incident to the employment, but they assume no extraordinary risks

1. See also the following railroad-bridge accident cases:

In LOUISVILLE & NASHVILLE R. R. Co. v. ORR, 84 Ind. 50 (May Term, 1882), bridge builder in defendant's employ, injured by his arm being caught in machinery appliance, caused by alleged defective appliance, judgment for plaintiff in the Superior Court of Vanderburgh county was *reversed*, for erroneous instruction as to duty of master in respect to machinery, etc. Following Lake Shore, etc., R'y Co. v. McCormick, 74

Ind. 440, and Umback v. Lake Shore, etc., R'y Co., 83 Ind. 191. [Reported in this volume of AM. NEG. CAS., *post*.]

In BEDFORD BELT R'Y CO. v. BROWN, 142 Ind. 659 (November Term, 1895), employee engaged in building a railway bridge injured by falling from bridge owing to alleged defective appliance used in construction of track, judgment for plaintiff in the Lawrence Circuit Court was *reversed*; contributory negligence; assumption of risk.

caused by the employer's breach of duty, unless they have knowledge of the unusual danger caused by the breach, and voluntarily continue in the company's employment. If, with this knowledge, they do continue, then the increased danger becomes an incident of the service which they assume, and for liability from which the master is exonerated. Indianapolis, etc., R'y Co. e. Watson, 114 Ind. 20.

The knowledge of the danger adds it as one of the incidents of the employment which the employee assumes. It becomes a danger which his continuance in the master's service makes an incident of the service, and when it takes this character the master is no longer bound to answer for the employee's safety, so far as it is imperiled by the danger voluntarily and knowingly assumed. The knowledge, in conjunction with the continuance in the service, operates as a waiver of the right to make the master responsible. "It is," says Mr. Beach, "the rule applicable to this matter that if the servant, when the defect or danger is brought to his knowledge — when he discovers that the machinery, buildings, premises, tools, or any other instrumentalities of his labor, are unsafe or unfit, or that a fellow-servant is careless or incompetent — continues in the employment, without protest or complaint, he is deemed to assume the risks of such danger, and to waive any claim upon his master for damages in case of injury." Beach Cont. Neg., § 140.

This puts the rule exonerating the master on the true ground. He is exonerated because the employee himself assumes the danger, as increased, and, as he voluntarily assumes it, the master is relieved. The parties change positions; the employee assumes the risk that, if it were not for his knowledge, his employer would be compelled to assume. The duty which the employer is under is materially affected by the element of knowledge, and unless a duty is shown of course there can be no actionable negligence, since a duty lies at the foundation of every right of action grounded on the negligence of a defendant. It must follow, in order to show a breach of duty creating a cause of action for its breach, that it is necessary to aver that the employee was ignorant of the default of the employer which increased the perils of the service.

The plaintiff in such a case is the actor, and must show a complete cause of action, and, to do this, he must aver facts showing that the danger which augmented the risks of his service was not

known to him. In at least two cases this court has explicitly affirmed this doctrine. *Lake Shore, etc., R'y Co. v. Stupak*, 108 Ind. 1; *Indiana, etc., R'y Co. v. Dailey*, 110 Ind. 75 (1).

From these decisions we should not depart, unless thoroughly satisfied that they are unsound in principle, and of this we are far from being convinced. There is some conflict in the authorities as to the principle upon which rests the rule exonerating the employer from liability, in cases where the employee continues in the employer's service after knowledge that his peril has been increased, but the weight of authority, as we believe, supports our decisions. All the authorities agree that negligence on the part of the employer is not to be presumed, and that it rests on the plaintiff to aver and prove every fact essential to the existence of actionable negligence. *Riest v. City of Goshen*, 42 Ind. 339; *Penn. Co. v. Whitcomb*, *supra*; *Summerhays v. Kan. Pac. R'y Co.*, 2 Colo. 484, 13 Am. Neg. Cas. 518<sup>n</sup>; *Mobile, etc., R. R. Co. v. Thomas*, 42 Ala. 672, 13 Am. Neg. Cas. 107; *State v. Phila., etc., R. R. Co.*, 60 Md. 555; *Davis v. Detroit, etc., R. R. Co.*, 20 Mich. 105; *The Gladiolus*, 21 Fed. 417; *Cummings v. National Furnace Co.*, 60 Wis. 603; *Belair v. Chicago, etc., R. R. Co.*, 43 Iowa, 662.

In stating what the employee must prove, a recent writer asserts that he must establish that he did not know, and had not equal means with the master of knowing, that the machine or appliance was defective. *Proof and Pleading in Accident Cases*, § 21. Many of the authorities we have cited and those which follow assert the same general rule. *Reardon v. N. Y., etc., Card Co.*, 19 J. & S. (N. Y.) 134; *Duffy v. Upton*, 113 Mass. 544; *Leary v. Boston, etc., R. R. Co.*, 139 Mass. 580; *Wright v. N. Y. Cent. R. R. Co.*, 25 N. Y. 562; *Stoeckman v. Terre Haute, etc., R. R. Co.*, 15 Mo. App. 503; *East Tennessee, etc., R. R. Co. v. Duffy*, 12 Lea, 63; *East Tenn., etc., R. R. Co. v. Stewart*, 13 Lea, 432; *St. Louis, etc., R'y Co. v. Harper*, 44 Ark. 524, 13 Am. Neg. Cas. 284; *Colo. Cent. R. R. Co. v. Ogden*, 3 Colo. 499, 13 Am. Neg. Cas. 523.

Men may accept employment in a service of a perilous character and yet not be guilty of contributory negligence, although they do assume all risks incident to the service which they enter. Men may, without being guilty of contributory negligence,

1. The Indiana cases cited in the with the Indiana cases in this volume opinion in the case at bar are reported of AM. NEG. CAS., *post*.

engage in the business of manufacturing gunpowder or dynamite, and yet, when they do engage in such a business, they take upon themselves all the ordinary risks incident to it. Employees engaged in any business, however dangerous its character, have a right to assume that their employer will not subject them to any unknown or extraordinary danger; the employer, however, is bound to do no more than use ordinary care, skill and diligence to provide for their safety, but this requires that he shall do all that the nature of the employment will permit to accomplish this object. But if he fails to do his full duty, and the employee has reasonable and adequate knowledge of the failure, and continues in the service, he assumes the risk resulting from this failure. There is a class of cases where a man has no right to assume the risk. Society has an interest in the lives of its members, and no citizen has a right to knowingly and voluntarily place himself in a position of immediate and certain danger. Indianapolis, etc., R'y Co. *v.* Watson, *supra*; Cunningham *v.* Chic., etc., R. R. Co., 17 Fed. 882.

Where the danger is not immediate and certain, a man may assume the risk without violating the rule last stated, but in doing so he divests himself of a right to recover from his employer in cases where the danger is fully and seasonably brought to his knowledge, since the known danger becomes in such cases one of the risks he assumes as an incident of his service. He may not be guilty of contributory negligence in taking some risk, since he may be doing what other reasonably prudent men likewise do; but, like all the others in the common service in which he engages, he assumes all the risks arising from dangers of which he has full notice, by continuing in service after he obtains that knowledge.

The question comes to us as one of pleading and not as one of evidence. Material facts must be directly stated in a pleading, but they may be inferred from testimony and from circumstances, when the question is as to the measure and sufficiency of proof. Inferences are admissible and controlling where the question is one of proof, but not so where the question is one of pleading. It is not enough to plead evidence from which facts may be inferred, but the facts themselves must be stated in an issuable form.

Judgment reversed. Petition for rehearing overruled.

## LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY COMPANY v. WRIGHT.

*Supreme Court, Indiana, May Term, 1888.*

[Reported in 115 Ind. 378.]

**BRAKEMAN INJURED BY OVERHEAD BRIDGE—DUTY OF RAILROAD COMPANY.**—An employee in the service of a railroad company as a brakeman has the right to assume that the railroad company has constructed and maintained its roadway and bridges in such a manner and condition that he can perform his duties with reasonable safety, and that if there is a low bridge or any such danger to be encountered in the service, he will be warned of it.

**EXTRA HAZARDS—DUTY OF MASTER TO INFORM EMPLOYEE OF SAME.**—Where there are dangers and hazards known to the master, or of which he ought to have knowledge by the use of ordinary care and which are not ordinarily and usually incident to the business, he should inform the servant of such danger when hiring him, unless the danger is so apparent that the latter will be bound to take notice of it.

**ASSUMPTION OF RISK—UNUSUAL DANGERS.**—A person contracting to work upon a railroad as a brakeman assumes the risks ordinarily and properly incident to such service, but he does not, by such hiring, assume the risk of unusual dangers of which he has no knowledge, or of which he is not bound to take notice.

**DANGEROUS LOW BRIDGE—LIABILITY FOR INJURY TO EMPLOYEE.**—A railroad company which constructs and maintains a bridge over its track so low that a brakeman cannot, while his train is passing thereunder, walk or stand upon the cars, or even apply the brakes, without injury, is guilty of negligence, and liable to one who, having no knowledge of the peril, is injured while in the discharge of his duty (1).

I. In *PENNSYLVANIA COMPANY v. SEARS*, 136 Ind. 460 (November Term, 1893), brakeman injured while attending to his duties by his head coming into collision with a bridge above his train, whereby his skull was fractured, head and face bruised, etc., and he was thrown to the ground upon the track and the cars ran over and crushed his leg, which had to be amputated, and suffered other injuries, judgment for plaintiff in the Allen Circuit Court was affirmed and petition for rehearing overruled. A. ZOLLARS, J. MORRIS and J. BRACKENRIDGE, appeared for appellant railway company; L. M. NINDE and H. W. NINDE, for appellee. The opinion by the court was delivered by

McCABE, J., the points decided being stated in the syllabus to the official report which (omitting some of the points relating to pleading and practice) are as follows:

"Where, in an action against a railroad company, by a brakeman on a freight train, for injuries received while in the discharge of his duty as such servant, the complaint alleged, among other things, that the train ran past and under the bridge, whereby his head was brought in collision with the bridge above the train, the inference is that the only place that the plaintiff could have occupied at the time the bridge came in contact with his head, was on the top of some of the cars in the train.

**CUSTOM OF OTHER RAILROADS — INCOMPETENT EVIDENCE.** — In such a case, evidence that there are bridges on all railroads in the United States too low for brakemen, standing or walking upon the top of ordinary box-cars, to pass under with safety, is not competent.

**INSTRUCTIONS — RECORD — APPEAL — PRACTICE.** — Rules of practice relating to the bringing of instructions into the record and their consideration on appeal discussed in the opinion.

FROM the Jasper Circuit Court. The case is stated in the opinion. *Judgment for plaintiff affirmed.*

W. F. STILLWELL, G. W. FRIEDLEY and G. W. EASLEY, for appellant.

W. P. ADKINSON, M. F. CHILCOTE, J. P. WRIGHT and E. P. HAMMOND, for appellee.

**Zollars, J.** — It is charged in the complaint that near Putnamville the track of the railroad is laid in a deep cut over which is a bridge upon a public highway; that the railroad company negligently constructed, and has negligently maintained, the bridge so low as not to afford sufficient space to allow brakemen walking or standing upon freight cars in the discharge of their duty in the management of trains to pass under it with safety; that the railroad company could, and should, have so constructed the bridge that brakemen could thus pass under it in safety; that it had full knowledge that the bridge was dangerous to its brakemen operating its trains; that it negligently failed to place upon or about the bridge lights or other danger signals in common use with well-managed railways, to warn brakemen of the danger.

"It sufficiently appears from such complaint that the plaintiff did not know of the dangerous character of the bridge, where the complaint alleges, and it is admitted by demurrer, that plaintiff had not, at or before he was injured, any knowledge or notice whatever that the bridge was so low that it would come in collision with his head or any part of his body as he passed under the same.

"In such case knowledge on the part of the company of such defect is sufficiently shown where the occurrence of the injury under the circumstances alleged in the complaint, and admitted by the demurrer, raises the presumption of negligence on the part of the defendant.

"The danger of an overhead bridge maintained by a railroad company, so low that it may come in contact with the heads of its brakemen while engaged in their duties on the tops of cars as they pass under such bridge, is not one of the dangers incident to such service.

"It is the duty of a railroad company to construct and maintain its tracks and bridges in a safe condition, and its employees have the right to presume that it has performed this duty, and that if the company discovers any defects liable to endanger the lives or limbs of their employees operating the road, it will give them timely warning thereof."

\* \* \*

It is further alleged that on, and for a short time prior to, January 13, 1882, appellee was engaged in the service of the railway company as a brakeman upon a freight train which passed back and forth over the road, under the bridge, and that with full knowledge of the dangerous condition of the bridge, the railway company negligently failed to notify him of the danger; that when the train upon which he was engaged as a brakeman was approaching the bridge at about 3 o'clock A. M., of January 13, 1882, and when the rain was falling and a heavy fog and intense darkness covered everything, so that appellee could not see or determine what point the train was passing or approaching, and being unacquainted with that part of the railway, and not knowing that the train was approaching a dangerous bridge, appellee obeyed a call to brakes made by the engineer in charge of the engine and went upon the top of the cars to set the brakes, as it was his duty to do as such brakeman, and that while setting the brakes the train passed under the bridge, which, without fault or negligence on his part, was brought in contact with the back part of his head with such force as to fracture his skull, thereby rendering him unconscious for weeks, causing him great suffering, both physical and mental, so as to impair his mind, causing paralysis of his right side, and thus rendering him a cripple for life, so that he is, and will continue to be, unable to make a living by manual or mental labor. The complaint closes with a general charge that all of the injuries were the result of negligence on the part of the railway company, and without negligence on the part of the appellee.

A motion was made below for an order upon appellee to make the complaint more specific. The motion was overruled.

We have considered the arguments of counsel in support of the motion, but do not think that the matter is of sufficient importance to require more than a statement that, whether the ruling of the court below was right or wrong, no substantial injury could result to appellant.

The court below overruled a demurrer to the complaint, and also a motion by appellant for judgment in its favor upon the answers of the jury to the interrogatories submitted by its counsel. Those rulings are assigned as errors. They may be considered together.

The substance of the answers of the jury to the interrogatories, so far as material, is as follows:

At the time of the injury to appellee, the railroad company was maintaining, and for seven years prior thereto had maintained, an overhead bridge upon a highway crossing its tracks a short distance south of the town of Putnamville. The distance from the top of the rails upon the track to the bridge above was, and is, fifteen feet and nine inches. The box freight cars used by appellant were eleven feet high. Neither appellee nor any other full-grown man could walk or stand erect upon the top of such box cars passing upon the track under the bridge without coming in contact with it. The only way in which appellee could have passed under the bridge in safety, when upon the top of such box cars, was to sit down, or stoop very low. He could neither sit down nor stoop low enough to escape danger, and at the same time apply the brakes. The railway company neither erected nor maintained any danger signals to warn brakemen of the approach to or nearness of the bridge. By reason of the lowness of the bridge, and the lack of danger signals, the service of a brakeman upon appellant's freight trains over that part of its road was a hazardous and dangerous service, and that fact and all other facts in relation to the bridge were known to the railway company before and at the time it employed appellee as a brakeman, and at the time he was injured. Previous to his employment upon appellant's road, appellee had had about one month's experience as a brakeman upon the Ohio and Mississippi Railroad. He was first employed by appellant on the 5th day of October, 1881, as a brakeman upon a freight train, his run being from New Albany to Greencastle, and continued in the service until the 4th day of November, 1881. That run carried him under the bridge in question. During that employment he passed with his train under the bridge from eight to ten times in the daytime, and the same number of times in the night. Subsequently, and on the 11th and 12th days of January, 1882, appellee was again employed by the railroad company as a head brakeman to assist in operating freight trains, his run, as before, being from New Albany to Greencastle, and under the low bridge. From his first employment up to the time of his injury, he had passed under the bridge from seventeen to twenty times, one-half of the number being in the night-time. At no time previous to his injury did he know that the bridge was too low to allow him to pass under it with safety when standing or walking upon the box cars in attending to the brakes. He had no knowledge that

the service was a hazardous one, by reason of the low bridge, and was not notified of that fact, nor of any fact as connected with the bridge, either by the railroad company or any other person. The jury further answered, that, prior to his injury, appellee did not have an opportunity to know that the bridge was too low to allow him to pass under it with safety when standing or walking upon the top of freight cars. They also answered, that he made no effort to ascertain the height of the bridge, or whether or not he could with safety pass under it when on the top of box cars attending to the brakes.

They further answered that the danger of brakemen being struck by the bridge was an open and obvious one in the daytime, but not at night. They still further answered, that, during the time appellee was in the employ of the railway company, he could not, by an ordinarily careful use of the opportunities afforded him, have discovered that the bridge was so low as to be dangerous.

On the morning of the 13th day of January, 1882, when it was yet dark, appellee started with his train south from the Greencastle junction towards New Albany. He knew that the first station south was Putnamville, and that the bridge in question was near to and south of the station, but he did not know of the danger. When within about one-third of a mile of Putnamville, the engineer, by the use of the steam whistle, called for setting the brakes. In obedience to that call, appellee went upon the top of the cars and moved from the front towards the rear of the train, until he reached the brake. The train was moving over a down-grade, and did not stop at Putnamville, but passed through and under the bridge some fifteen hundred feet south, the engineer not having shut off the steam soon enough to stop the train at the station. As the train passed under the bridge, appellant being at the brake in a stooping posture, and his face towards the rear of the train, the bridge struck him upon the back of the head, about one and one-half inches from the top.

When called upon the top of the cars, appellee, because of the darkness, did not know what portion of the road the train was passing over. When the train was passing through Putnamville he was not aware of the fact, and when injured did not know that the train was near the bridge. After going upon the top of the cars he did not look in the direction in which the train was moving, and could not have seen the bridge had he looked,

because of the darkness. Appellee could not, by the use of ordinary care and diligence, have avoided the injury.

In support of the motion for judgment in favor of the railway company upon the above answers to the interrogatories, its counsel argue that, upon the facts disclosed, it must be presumed and concluded as a matter of law that appellee contracted with the company with reference to the hazardous nature of the service, and that, therefore, he cannot recover.

The objections urged to the complaint, as we gather from the argument, are:

First. That no facts are alleged showing that the railway company was under a duty to erect or maintain any other or different bridge from that in question;

Second. That no facts are averred showing that it was the duty of the railway company to have warned appellee of the danger, because the danger was in its nature open and obvious;

Third. That it is not shown by the averments of the complaint that appellee's ignorance of the lowness of the bridge was not the result of want of ordinary care on his part;

Fourth. That no facts are averred showing that the bridge was not built in the usual and ordinary way, and of the usual and ordinary height; and,

Fifth. That it is not averred that appellee did not know that the bridge was dangerous by reason of being too low for a brakeman to pass safely under it when standing or walking upon the top of box-cars.

We think that the complaint sufficiently shows that appellee had no knowledge of the dangerous condition of the bridge. We think, too, that the complaint sufficiently shows that appellee's ignorance of the condition of the bridge was not the result of his own negligence. There is also a broad averment in the complaint that appellee received the injury without any negligence on his part. See *Town of Rushville v. Adams*, 107 Ind. 475, and cases there cited.

He was required to observe ordinary care for his own safety, but he was not required to go over the road upon a tour of inspection looking for defective bridges or faulty tracks before engaging in the service.

Because of its duty to him, appellee had the right to assume that the railway company had constructed and maintained its roadway and bridges in such a manner and condition that, as a

brakeman upon its trains, he could perform his duties with reasonable safety, and that if there was any such danger to be encountered in the service as the low bridge, he would be warned of it.

In the case of *Boyce v. Fitzpatrick*, 80 Ind. 526, 529, 14 Am. Neg. Cas. 443, *ante*, in commenting upon cases cited, it was said: "These cases show that, while a servant assumes the risk, more or less hazardous, of the service in which he engages, he has a right to assume that all reasonable attention will be given by his employer to his safety, and that he shall not be carelessly and needlessly exposed to risks, which might be avoided by ordinary care and precaution on the part of the employer." See also *Rogers v. Overton*, 87 Ind. 410, 413, 14 Am. Neg. Cas. 460, *ante*.

In the recent case of *Pittsburgh, etc., R'y Co. v. Adams*, 105 Ind. 151, 161, this court said that, as a general rule, in the contract of hiring there is an implied undertaking upon the part of the master that he will use all reasonable care to furnish safe premises, machinery and appliances for the conducting of the business safely.

In the recent case of *Baltimore, etc., R. R. Co. v. Rowan*, 104 Ind. 88, 93 (1), in speaking of low bridges, in a case in all essentials like that before us, and after citing the cases *pro* and *con*, it was said: "It seems to us that a railroad company is, and ought to be, required to construct and maintain its roadway and appendages, and its overhead structures, in such a manner and condition that its employee or servant can do or perform all the labors and duties required of him, with reasonable safety." See the cases there cited; see also *Indiana Car Co. v. Parker*, 100 Ind. 181, 14 Am. Neg. Cas. 422, *ante*; *Umbach v. Lake Shore, etc., R'y Co.*, 83 Ind. 191; *Louisville, etc., R. R. Co. v. Orr*, 84 Ind. 50; *Atlas Engine Works v. Randall*, 100 Ind. 293, 14 Am. Neg. Cas. 438, *ante*.

In the case of *Indianapolis, etc., R. R. Co. v. Love*, 10 Ind. 554, in speaking of the duty of the master to furnish a safe roadway, and to inform the servant of unusual dangers, it was said: "If a defect existed in the road which was known to the company, but which it was impossible for them to immediately

1. In *BALTIMORE & OHIO & CHICAGO* of overhead bridge and head injured, *R. R. Co. v. ROWAN*, 104 Ind. 88 (November Term, 1885), brakeman on top judgment for plaintiff in the La Grange Circuit Court was affirmed. of freight car striking against timbers

remove or remedy, and in consequence thereof the road was unsafe but not impassable, and yet they should place an employee upon the road, and suffer him, in ignorance of said defect, to attempt to operate it, and injury should thereby result to him, certainly there would be a liability." See also *Thayer v. St. Louis, etc., R. R. Co.*, 22 Ind. 26.

In the case of *Baxter v. Roberts*, 44 Cal. 187, 13 Am. Neg. Cas. 514, it was said: "That one contracting to perform labor or render service thereby takes upon himself such risks and only such as are necessarily and usually incident to the employment, is well settled. Nor is there any doubt that if the employer has knowledge or information showing that the particular employment is from extraneous causes known to him hazardous or dangerous to a degree beyond that which it fairly imports or is understood by the employee to be, he is bound to inform the latter of the fact or put him in possession of such information; these general principles of law are elementary and firmly established," etc.

The facts in the case of *Ill. Cent. R. R. Co. v. Welch*, 52 Ill. 183, 14 Am. Neg. Cas. 356, *ante*, in brief, were these: The railroad track at Mendota was about eighteen inches from the edge of an awning, which projected from the station-house, so that when a freight car stood upon the track the inside edge of the car was about even with the outer edge of the awning. The awning was about eighteen inches higher than the car. There being a signal for brakes, the plaintiff in the case, a brakeman, ran upon the ladder on the side of a car, and before reaching the roof was struck by the awning and injured. It was insisted in behalf of the railroad company, that there could be no recovery, for the reason that the brakeman had assumed the risks incident to the service, and had an opportunity to know of the danger from the awning. In answer to that contention the court said: "There are many freight depots and station-houses upon the line of the Central Railway, and it would be preposterous in us to say, or to ask the jury to say, that a brakeman engaging in the service of the company must be held to know whether or not there may be one among them whose roof or awning so projects over the line of road that a brakeman on a freight train, in the performance of his duties, would be liable to be swept from the train by a collision with it. We held, in the *Chicago & N. W. R. Co. v. Swett*, 45 Ill. 201, 14 Am. Neg. Cas. 358, *ante*, that the corporation is bound to furnish to its servants safe materials

and structures, and must, in the first instance, properly construct its road with all its necessary appurtenances. This, of course, includes the obligation to keep in proper repair. When the appellee entered the service of this company, he had a right to presume that it had, in these respects, discharged its obligations. The ordinary perils of railroad life he of course assumed, and also any special dangers arising from the peculiar condition of the road so far as he knew of their existence. \* \* \* But it would have been morally impossible for him to have ascertained the existence of all such special perils as this which caused the injury, and there is no reason for supposing that he had acquired such knowledge before the accident, as he had been but two months upon the road, and had always passed the station, where he was injured, in the night, except upon two trips. Moreover, it is to be remarked that the danger was of such a character that it might well escape the observation of a person who had been even for a long time upon the road."

In Mr. Wood's work on Railway Law, vol. 3, at pages 1480-1, in speaking of low bridges, and the cases in which it was held that the railway company was not liable, it is said that the doctrine of those cases proceeds upon the ground that the servant knew of the hazard, and, therefore, assumed the risk incident to it, and that the master will be liable, where the circumstances are such that the servant cannot be charged with such knowledge.

As it is the duty of the master to inform his servant of increased danger and hazard created by him in the change of machinery or premises, unless the servant has notice, or the changed and increased danger are so apparent that he ought to take notice, so, where there are dangers and hazards known to the master, or of which he ought to have knowledge by the use of ordinary care, and which are not ordinarily and usually incident to the business, he should inform the servant of such danger when hiring him, unless the danger is so apparent that the servant will be bound to take notice of it. *Hawkins v. Johnson*, 105 Ind. 29, 35, 14 Am. Neg. Cas. 444, *ante*; *Pittsburgh, etc., R'y Co. v. Adams*, 105 Ind. 151, 165 (1); *Bradbury v. Goodwin*, 108 Ind. 286, 14 Am. Neg. Cas. 450, *ante*.

A person contracting to work upon a railway as a brakeman,

1. The Indiana master and servant reported with the Indiana cases in this cases cited in the opinion in the case at volume of AM. NEG. CAS., *post*.  
bar are (except where otherwise stated)

assumes the risks ordinarily and properly incident to such service, but he does not, by such hiring, assume the risk of unusual dangers of which he has no knowledge, or of which he is not bound to take notice.

It cannot be said here that, by the contract of hiring, appellee assumed the risk of injury from the bridge by which he was injured. Clearly it ought not to be said that the railway company was under no duty to build and maintain the bridge in a different manner and condition from what it did. It is charged in the complaint, and shown by the answers of the jury to the interrogatories, that the railway company was guilty of negligence, both in the building and maintenance of the bridge.

It is charged in the complaint that, it was so low that a brakeman, in the discharge of his duty in setting brakes, could not, without injury, walk or stand upon the top of the cars. It is shown by the answers of the jury to the interrogatories that the distance from the top of the rails to the bridge was fifteen feet and nine inches, and that the box-cars were eleven feet high, thus leaving a space of four feet and nine inches only between the top of the cars and the bridge. To say that a railway company has performed its whole duty when it erects and maintains such a bridge is, in effect, to say that it may abandon all reasonable care for the safety of its brakemen upon its trains. At best, this service is hazardous enough. Surely, the railway companies should not increase the danger by the erection and maintenance of such low bridges. All reasonable precautions ought to be taken to decrease the danger as much as possible. There can be no sufficient reason for a holding that while the railway company must exercise reasonable care to provide a safe roadway and bridges below, it may abandon, to a large extent, all care as to bridges above.

Called, as they often are, to their brakes, upon the top of the train in rainy and dark nights, when they have no means of determining exactly the portion of the road over which the train is passing, it might be expected that brakemen will be injured by collisions with bridges such as that described in the complaint and the answers of the jury to the interrogatories.

Assuming that railway companies perform the duties which they owe to their employees, it cannot be conceded that the bridge in question was built of the usual and ordinary height.

There is nothing in the complaint or the answers of the jury to the interrogatories showing, or tending to show, that it is a usual or customary thing for railway companies to build and maintain overhead bridges so low as that which caused the injury to appellee.

It is shown that appellee had no knowledge of the condition of the bridge, and that his want of knowledge was not the result of negligence on his part. Because of his want of knowledge, and the increased and unusual hazard caused by the lowness of the bridge, it cannot be said that appellee voluntarily assumed the risk of injury therefrom.

Both the demurrer to the complaint, and the motion for judgment in favor of appellant upon the interrogatories, were properly overruled.

In answer to their contention that the bill of exceptions is not in the record, because the rendition of the judgment and the approval of an appeal bond intervened between the overruling of the motion for a new trial and the giving of time within which to file a bill of exceptions, we refer appellee's counsel to the recent case of *Kopelke v. Kopelke*, 112 Ind. 435.

Appellant's counsel offered to prove that there are bridges on all railways in the United States too low for brakemen, standing or walking upon the top of ordinary box cars, to pass under with safety. The court below did not err in excluding the evidence. As we have seen, a railway company falls short of its duty if it constructs overhead bridges so low as to be dangerous to its brakemen in the discharge of their duties. If such bridges are constructed, it is the duty of the company to notify its brakemen of the danger, unless they already have knowledge, or the circumstances are such that they are bound to take notice. That other companies may have neglected their duty and built and maintained low and dangerous bridges, cannot exonerate, or tend to exonerate, appellant from liability. There may be some such bridges upon other roads, but there was no offer to prove that they are in such general use as to be an ordinary and usual incident of the service of brakemen. Here, appellee had had but two months' experience as a brakeman, and had no knowledge of the low bridge. The fact that other railway companies may have maintained some of their bridges so low as to be dangerous, is not sufficient to charge appellee with notice here. If such low bridges are thus maintained, they are surely the exception and

not the rule. *Louisville, etc., R'y Co. v. Pedigo*, 108 Ind. 481, 9 Am. Neg. Cas. 277n.

Appellant's counsel first offered to introduce in evidence a letter, and, second, a portion of a letter, written by appellee to an officer of the railway company before this action was commenced. It is earnestly insisted that the court erred in excluding the letter and the portion thus offered. The letter was written in answer to one received by appellee. It is well settled that an offer or proposition for a compromise of a legal controversy, not accepted, is not competent evidence for or against either party. *Board, etc., v. Verbarg*, 63 Ind. 107; *Dailey v. Coons*, 64 Ind. 545.

It is also settled that an admission of an independent fact in no way connected with the offer of compromise, although made during the negotiations, is competent evidence.

In the case of *Wilt v. Bird*, 7 Blackf. 258, it was said: "An offer, concession, or admission, made in the course of an ineffectual treaty or compromise, and constituting, in itself, the point yielded for the sake of peace, and not because it was just or true, is not competent evidence against the party making it; but the law is otherwise with regard to an independent fact admitted to be true, but not constituting such yielded point."

An admission of a fact, not made simply because it is a fact, but expressly or clearly for the sake of, and as a part of an attempted compromise, is not competent evidence in a subsequent action against the party making it. *Cates v. Kellogg*, 9 Ind. 506.

And so, if an admission is made not simply because it is a fact, but to open the way to a compromise, it is not admissible. *Binford v. Young*, 115 Ind. 174.

That the letter, as a whole, constituted an offer of compromise, is not questioned. We have examined the letter carefully, and are fully persuaded that no portion of it is competent evidence in this action against appellee.

It is very apparent that nothing was admitted as an independent fact simply because it was a fact, if, indeed, it can be said that there is any admission or statement that could in any way be beneficial to appellant. On the other hand, it seems very clear to us that all that was written by way of argument for the purpose of bringing about an adjustment to avoid litigation. The whole letter had that single object in view, and, as said in

the case of Home Ins. Co. *v.* Baltimore Warehouse Co., 93 U. S. 527, 548, in speaking of an offer to introduce a portion of a letter written with the object of effecting a compromise, "it contains no statement which can be separated from the offer and convey the idea which was in the writer's mind."

Dr. S. W. Yost, at the time of the trial, had been a practising physician and surgeon for more than twenty years. *Prima facie*, at least, that rendered him competent to give an opinion as to the probable result of appellee's injuries. He had attended him as physician for some two months after he was injured, at which time he was also in the employ of the railway company as surgeon.

After stating in detail appellee's condition, and the character and condition of his wounds at the time he attended him, he was allowed to state that the probabilities are that he will never, to any great extent, be able to perform manual or mental labor, without a removal of a depressed portion of the bone which was, and is, pressing upon the brain, by reason of the wound upon the head, and that such an operation would be fraught with great danger. It was competent for Dr. Yost to give his opinion as to the probable results of appellee's injuries. Carthage T. P. Co. *v.* Andrews, 102 Ind. 138, 145; Louisville, etc., R'y Co. *v.* Wood, 113 Ind. 544; Louisville, etc., R'y Co. *v.* Falvey, 104 Ind. 409; City of Fort Wayne *v.* Coombs, 107 Ind. 75.

His evidence in that regard was not incompetent because he had not attended appellee continuously up to the time of the trial. He could state his opinion, based upon his knowledge and observation at the time he attended appellee. Had he attended him continuously his testimony might have been of more weight, but it would have been no more competent.

Objections were made below, and are urged here, to the testimony of Dr. Harry L. Taylor. He had been a physician and surgeon since 1872, and at the time of the trial was a professor in the Indiana Electric Medical College. *Prima facie*, he was competent to give an opinion as to the probable results of the fracture of appellee's skull. Dr. Yost had given a detailed statement of appellee's condition for two months after he had received the injury. A hypothetical question, involving the facts as stated by him, was propounded to Dr. Taylor, and upon that he was allowed to give his opinion as to the probable results of the injuries. The testimony of Dr. Yost as to appellee's condition at the time he attended and treated him, was competent

evidence in the case, and hence it was competent to embody the facts so given in a hypothetical question to Dr. Taylor. Here, again, the testimony of Dr. Taylor was competent, although it might have been of more weight and importance had it been based upon a hypothetical question embodying the facts as to appellee's condition at the time of the trial.

With a description of the locality, the height of the bridge, and a statement that no danger signals were kept at the bridge, John B. Cooper was allowed to state that, prior to the injury to appellee, three persons, giving their names, being upon the top of moving trains, were injured and crippled by coming in contact with the bridge, some of whom died from the effects of the injuries.

There is some conflict in the authorities, but under our cases, supported by many others, the evidence was competent as tending to show notice on the part of the railway company that the bridge was dangerous. It would not be profitable here to do more than cite the cases. See *City of Delphi v. Lowery*, 74 Ind. 520, 523, and cases there cited; *Cleveland, etc., R. R. Co. v. Newell*, 104 Ind. 264, 9 Am. Neg. Cas. 289<sup>n</sup>; *City of Fort Wayne v. Coombs*, *supra*.

The arguments by appellant's counsel upon the instructions given and refused are elaborate, and such as to challenge careful consideration, were the instruction in the record. We are met, however, with the contention on the part of appellee's counsel that the instructions are not in the record, for the reason that the record contains no evidence that they were ever filed. They are not embodied in a bill of exceptions. The clerk has copied the instructions into the transcript, but, as contended by appellee's counsel, there is nothing to show that they were ever filed, and hence cannot be regarded as a part of the record. As said in the case of *O'Donald v. Constant*, 82 Ind. 212: "The transcript contains no copy of the clerk's notation of the filing, nor any recital that they were filed." Not being a part of the record, the instructions found in the transcript cannot be considered by this court. To bring instructions into the record without a bill of exceptions, the statute imperatively requires that they shall be signed by the judge and filed. That they must be thus filed, is a rule of practice established by the legislature, which this court could not change, if such a change was desired. See *R. S.*, 1881, § 533, clause 6; *Supreme Lodge Knights of Honor v.*

Johnson, 78 Ind. 110; Elliott *v.* Russell, 92 Ind. 526, and cases there cited; Olds *v.* Deckman, 98 Ind. 162, and cases there cited; Landwerlen *v.* Wheeler, 106 Ind. 523; Childress *v.* Callender, 108 Ind. 394; Fort Wayne, etc., R'y Co. *v.* Beyerle, 110 Ind. 100.

It is further contended by counsel for appellant that the verdict and judgment are not supported by sufficient evidence, and are contrary to law. It may be said that it was possible for appellee, while in the employ of the railway company, to have discovered that the bridge was dangerous. He, however, testified positively that he did not know that it was dangerous, and the other facts stated by him and other witnesses are not such as to justify this court in holding, as a matter of law, that he was bound to take notice and exercise the necessary precautions, having such notice, to avoid injury. Nor can this court, considering all the evidence in the case, say that the judgment for \$10,000 is excessive.

Judgment affirmed with costs. Petition for rehearing overruled.

BRAKEMAN KILLED — FREIGHT TRAIN DERAILED — BREAKING OF SWITCH-PIN — NEGLIGENCE OF SWITCH-TENDER — FELLOW-SERVANT. — In **SLATTERY'S ADM'R ET AL. V. TOLEDO & WABASH R'Y CO.**, 23 Ind. 81 (*November Term, 1864*), it was held that a brakeman on a train, and one whose duty and business it is to attend a switch, are engaged in the same general undertaking, and the company is not liable to one for an injury caused by the negligence of the other.

The complaint stated, in substance, that A. was brakeman on a freight-train of defendant, and was killed by the cars being thrown off the track by the breaking of a switch-pin, which the company and its servants, knowing it was insecure, had carelessly left out of repair for twelve days previous. There was no switch-tender, and the whole care of the switch, and everything pertaining to its security, was under the control of the section-boss and his hands, who had nothing to do with running the trains. Held, that in the absence of an averment that the company was negligent in employing an incompetent section-boss, the complaint did not sufficiently state a case of negligence against the company. Judgment for defendant in the Wabash Court of Common Pleas was affirmed.

BRAKEMAN INJURED IN COLLISION BETWEEN EXPRESS AND FREIGHT TRAINS—LIABILITY OF RAIL-ROAD.—In PITTSBURGH, FORT WAYNE & CHICAGO R'Y CO. v. RUBY, 38 Ind. 294 (*November Term, 1871*), appeal from judgment for plaintiff in the Allen Circuit Court, judgment was *affirmed*, and petition for rehearing overruled. In stating the issues, BUSKIRK, J., said: “This was a suit against the railway company for an injury which is alleged to have occurred by the negligence of a co-employee. The plaintiff was a brakeman on an express train, and was injured while in the discharge of his duty, by a collision between the express and a freight train which was standing on a side track, waiting for the express train to pass. The switch had been left open, as was alleged, by the carelessness of David Kiser, the conductor of the freight train. It is alleged in the complaint that David Kiser and all the employees on the freight train were negligent, unskilful, and incompetent; and that the defendant negligently employed them, and had retained the said Kiser in her employment after she had received notice that he was negligent, unskilful, incompetent, and reckless in the discharge of his duties as such conductor. As there is no question raised as to the sufficiency of the pleadings, we do not deem it necessary to make any fuller statement of the issues than is above given.” \* \* \* The case was tried by a jury, and, on demand of defendant, a special verdict was required. The errors assigned relate to the special verdict, and refusal to grant new trial. The Supreme Court (per BUSKIRK, J.) set out the special verdict and the assignments of error, and discussed the points at length, citing numerous authorities. The points decided are stated in the syllabus to the official report as follows:

“It is the duty of the court, whenever a special verdict is demanded, to give each of the parties the privilege and time required to prepare, with care, the draft of a special verdict. If either of the parties should refuse to avail himself of this right, he cannot complain of undue advantage gained by the other party in thus presenting his views of the evidence to the jury.

“Where an employee of a railroad company is injured in running a train, and such injury is caused by the negligence of his co-employee, the company is only responsible for ordinary care.

“For the purpose of showing that the officers of a railroad corporation did not exercise due care, prudence, and caution in the employment of, or in retaining in service, careful, prudent, and skilful persons to manage and operate its road, and for the purpose of charging such corporation with notice of the incompetency of its

employees, specific acts of negligence or unskilfulness of such employees may be proved, and it may be proved that such acts were known to such officers prior to the employment of such persons, or that such employees were retained in such service after notice of such acts.

"Notice to an agent of a corporation relating to any matter of which he has the management and control, is notice to the corporation.

"Questions presented for the first time on a petition for a rehearing will not be considered by this court."

BRAKEMAN THROWN FROM TRAIN — DEFECTIVE BRAKE — SPECIAL VERDICT — GENERAL VERDICT SHOWING FREEDOM FROM CONTRIBUTORY NEGLIGENCE. — In *MATCHETT v. CINCINNATI, WABASH & MICHIGAN R'Y CO.*, 132 Ind. 334 (*September, 1892*), brakeman thrown from moving train while attending to defective brake, judgment for the railway company rendered on answers to special interrogatories by jury, a general verdict being rendered in favor of plaintiff, in the Grant Circuit Court, was *reversed*. The syllabus to the official report states the points decided as follows:

"A brakeman instituted an action against a railroad company to recover damages for injuries alleged to have been occasioned by a defective brake. The complaint alleged that the defect was unknown to the plaintiff, but that it was known to the defendant. The defendant claimed that under the rules of the company it was plaintiff's duty to inspect the brake; that the railroad company had no knowledge of the defect, nor means of knowledge, and that the plaintiff both had the means of knowledge, and was bound to know of the defective brake. A general verdict was returned for the plaintiff. The jury also returned answers to a number of interrogatories submitted to them. *Held*, that the general verdict in favor of the plaintiff was in effect a finding that there was negligence on the part of defendant, and that the defect in the brake was not a risk assumed by the plaintiff as an incident to his employment, and that plaintiff had no knowledge of the defective brake. *Held*, also, that the general verdict on these questions was conclusive, as the answers to interrogatories were not utterly irreconcilable therewith." It was further held that: "Where the answer to one of the interrogatories stated that the defect in the brake could have been readily discovered by the plaintiff, and the answer to another interrogatory stated that it was not shown whether the defect could have been discovered had an examination been made, the answers

neutralized each other, leaving the general verdict decisive that the plaintiff was free from contributory negligence." [Other points related to rulings of practice.]

**BRAKEMAN KILLED WHILE COUPLING CARS — RULES AND REGULATIONS — VIOLATION OF RULE BY EMPLOYEE — RAILROAD NOT LIABLE — LAW OF MASTER AND SERVANT.** — In **PENNSYLVANIA COMPANY v. WHIT-COMB, ADM'R**, 111 Ind. 212 (*June, 1887*), an action by the administrator of Millard Spurlin, a brakeman in the railway company's employ, who was killed while coupling cars, judgment for plaintiff in the Shelby Circuit Court was *reversed*, the points decided by **ELLIOTT, J.**, being stated in the syllabus to the official report as follows:

1. "It is the duty of the employer to provide the employee with a safe working place and with safe machinery and appliances, and in discharging this duty he is required to exercise ordinary care and skill.

2. "The duty to provide employees with safe machinery and appliances cannot be so delegated by the master as to relieve him from responsibility. The agent to whom it is intrusted, whatever his rank may be, acts as the master in discharging it.

3. "An employer may adopt reasonable rules for the government of his employees, and when brought to the knowledge of the latter, who thereafter continue in the master's service, the rules and an implied undertaking to obey them enter into the contract of service.

4. "Where a rule of a railroad company requires that cars shall be coupled by the use of coupling-sticks, and this rule is brought to the knowledge of one employed as brakeman, and assented to by him, it constitutes a part of his contract of service, and for an injury received by him in endeavoring to make a coupling by hand, the company is not liable, unless it be shown that the act could not have been safely performed even by the use of the appliance provided, or that obedience to the rule was not practicable under the circumstances of the particular case."

The court, in the course of its opinion, cited numerous authorities on the points decided, among the cases being the following: **Krueger v. Louis.**, New Albany & Chicago R'y Co., 111 Ind. 51; **Bradbury v. Goodwin**, 108 Ind. 286; Pittsburgh, etc., R'y Co. v. Adams, 105 Ind. 151; Balt., etc., R. Co. v. Rowan, 104 Ind. 88; Indiana Car Co. v. Parker, 100 Ind. 181 (as to duty of employer to provide safe machinery); **Krueger v. Louis.**, etc., R'y Co., 111 Ind. 51; Indiana Car Co. v. Parker, 100 Ind. 181;

Northern Pac. R. Co. *v.* Herbert, 116 U. S. 642 (as to delegation of master's duty); Umback *v.* Lake Shore, etc., R'y Co., 83 Ind. 191; Louis., etc., R. Co. *v.* Orr, 84 Ind. 50; Bradbury *v.* Goodwin, 108 Ind. 286; Lake Shore, etc., R'y Co. *v.* Stupak, 108 Ind. 1; Indiana, etc., R'y Co. *v.* Dailey, 110 Ind. 75; Hatt *v.* Nay, 10 N. E. Rep. 807; Balt., etc., R. Co. *v.* Rowan, 104 Ind. 88; Buzzell *v.* Laconia Mfg. Co., 48 Me. 113; Frazier *v.* Penn. R. Co., 38 Pa. St. 104; Mad River, etc., R. Co. *v.* Barber, 5 Ohio St. 541; Senior *v.* Ward, 1 El. & El. 385; Payne *v.* Western, etc., R. Co., 13 Lea (Tenn.), 507; Carew *v.* Rutherford, 106 Mass. 1; Heywood *v.* Tillson, 75 Me. 225; Collins *v.* New England Iron Co., 115 Mass. 23; Bradley *v.* Salmon Falls, etc., Co., 30 N. H. 487; Abel *v.* President, etc., 103 N. Y. 581; Vose *v.* Lancashire, etc., R'y Co., 2 H. & N. 728; Haynes *v.* East Tenn., etc., R. Co., 3 Cold. (Tenn.) 222; Chicago, etc., R. Co. *v.* Bills, 104 Ind. 13; Western Union Tel. Co. *v.* Harding, 103 Ind. 505, 511; Ohio, etc., R'y Co. *v.* Applewhite, 52 Ind. 540; Pittsburgh, etc., R'y Co. *v.* Nuzum, 50 Ind. 141; Ford *v.* Fitchburg R. Co., 110 Mass. 240; Sprong *v.* Boston, etc., R. Co., 58 N. Y. 56; Memphis, etc., R. Co. *v.* Thomas, 51 Miss. 637; Louis., etc., R'y Co. *v.* Frawley, 110 Ind. 18; Long *v.* Straus, 107 Ind. 94; Roesner *v.* Hermann, 8 Fed. 782; Western, etc., R. Co. *v.* Bishop, 50 Ga. 465; Hard *v.* Vermont, etc., R. Co., 32 Vt. 473; Nave *v.* Flack, 90 Ind. 205 (as to employer's rules and regulations; violation of same by employee; assumption of risk, etc.).

[The Indiana cases cited in the preceding paragraph will be found reported with the Indiana cases in this volume of AM. NEG. CAS.]

BRAKEMAN INJURED — DEFECTIVE APPLIANCE — NOTICE OF DEFECT — FOREIGN CAR — INSPECTION — PLEADING — SPECIAL VERDICT — PRACTICE. — In CHICAGO, ST. LOUIS & PITTSBURGH R. R. CO. *v.* FRY, ADM'X, 131 Ind. 319 (*November Term, 1891*), judgment on special verdict for plaintiff in the Cass Circuit Court was reversed. The action was brought by the legal representative of Fry, to recover for injuries received by him while in service of defendant as brakeman on a freight train, which caused his death. The complaint charged that one of the cars of the defendant's train upon which the deceased was employed was what is called a "gondola" car, upon which the brake-staff was located at the end of and close to the edge of the car; that this brake-staff was dangerous and unsafe to be used for the purpose for which it was intended and provided, by reason of its being too light, weak and fragile, and for the further reason that at a point on the same at or near the ratchet wheel at the bottom

surface of the deck or floor of the car it was cracked and broken on opposite sides to the depth of one-half an inch on each side, leaving only one-half inch in diameter of sound iron at that point; that it had been so cracked and broken for two months before the plaintiff's decedent was injured, and that the defendant had notice of its defective and unsafe condition for that length of time; that the said Daniel L. Fry was ignorant of its defective and dangerous condition, and was injured without fault on his part while in the discharge of his duties. N. O. Ross and J. C. NELSON, appeared for appellant; G. N. FUNK and D. C. JUSTICE, for appellee. The opinion was delivered by MILLER, J., who, after setting out the complaint, the points of appeal, and the findings on the special verdict, said:

"In order to recover against the defendant it was essential that the plaintiff should allege, and prove, that the defect which caused the injury was known to the defendant, or was such as with reasonable diligence ought to have been discovered. Pittsburgh, etc., R'y Co. *v.* Adams, 105 Ind. 151, 163; Sack *v.* Dolese, 137 Ill. 129, 14 Am. Neg. Cas. 272, *ante*. There is no finding in the verdict, in express terms, that the defendant had notice or knowledge of the defective condition of the brake-staff that caused the accident; the utmost that is claimed in that direction is, that it states facts which raise an inference of knowledge, or of opportunity, by the use of reasonable diligence, to acquire knowledge of such defects.

"It is the office of a special verdict to find the ultimate facts, and not merely to state the evidentiary facts. The court can only draw such inferences as irresistibly result from the facts found by the jury. Gordon *v.* Stockdale, 89 Ind. 240; Locke *v.* Merchants' Nat. Bank, 66 Ind. 353; Stix *v.* Sadler, 109 Ind. 254.

"It requires no study of the findings of the jury to determine, not only that they did not find facts from which an inference of notice of the defects arises, but that on the contrary they find that upon inspection made at different times and places, no defect was found in the brake-staff, and that such defect as existed could not have been discovered without taking the break-staff off the car and striking it with a hammer. It is insisted by the counsel of the appellee, that the fact that the car had been in the possession of the company for nearly two weeks, was of itself sufficient to charge the company with notice, and they cite in support of the proposition, Fay *v.* Minneapolis, etc., R'y Co., 30 Minn. 231. There is this important difference between these two cases. In that case the jury found that the company had notice of the defect, and the court say in the opinion that the 'defect in the car was readily discernible

upon proper inspection.' The car which occasioned the injury having been received by the company loaded, and in the regular course of business, from another company for transportation over its lines, the receiving company owed to its employees the duty of making proper inspection and giving notice of its defects, if any were found. *Cincinnati, etc., R. Co. v. McMullen*, 117 Ind. 439. If the car came to it with defects visible or discoverable by ordinary inspection, it should either have refused to receive it, or immediately repaired it sufficiently to have it made reasonably safe.

"The inspection which a company is required to make of a foreign car tendered it by another company for transportation over its lines, is not a merely formal one but should be made with reasonable care so as to furnish its employees with reasonably safe appliances for use in the discharge of their duties. *Patt. R'y Acc. Law*, §§ 290, 291. \* \* \* The company ought not however to be held liable for hidden defects which could not be detected by such an inspection as the exigencies of traffic will permit. *Patt. R'y Acc. Law*, § 290." \* \* \*

On the question of the duty of a railroad company to inspect a foreign car the court cited *Mo. Pac. R'y Co. v. Barber*, 44 Kan. 612, which quoted with approval the opinion on that point in *Gutridge v. Mo. Pac. R'y Co.*, 94 Mo. 468, and referring to the special verdict said:

"We are of the opinion that the verdict does not show either notice to the defendant of the defect complained of, or state facts from which we can infer notice, and for that reason the judgment of the court will have to be reversed." \* \* \*

**BRAKEMAN INJURED WHILE COUPLING "FOREIGN CARS"—ERRONEOUS INSTRUCTION AS TO LIABILITY FOR USING SUCH CARS.** — In *PENNSYLVANIA CO. v. EBAUGH*, 144 Ind. 687 (*November Term, 1895*), brakeman injured while coupling "foreign cars," judgment for plaintiff in the Marion Circuit Court was *reversed*, the case and points being stated by HACKNEY, CH. J., as follows:

"This suit was brought by the appellee [plaintiff below] against the appellant [defendant below], and his complaint consisted of three paragraphs. One paragraph tendered the issue that the appellant had been negligent in requiring the appellee, a brakeman in its employ, to couple two freight cars, not owned by the road, the drawbars of which were not of uniform standard, but were such that one stood higher than the other, and that said cars were constructed with deadwoods and with floors projecting over the ends

of the sills so that when he attempted to make the coupling his arm was caught between the deadwoods and crushed. As pertinent to this issue the appellant requested the trial court to charge the jury that 'It was not negligence for the defendant company to use cars on its railroad and in its yards, the couplings or 'deadwoods' of which were not of uniform or equal height.' This charge was refused, but the court gave, as its own, the following: '4. It is not negligence for the defendant company to use cars on its railroad and in its yards, the couplings or deadwoods of which were not of uniform or equal height, *provided the said deadwoods or couplings were in other respects safe appliances.*' "

"The question is presented on behalf of the appellant as to the effect of the modification of the rule announced in the charge refused, as we find it in the words above italicized.

"The following decisions sustain the rule that it is not negligence for a railway company to use, of its own and those of another company in the regular transportation, cars constructed with uneven couplings or deadwoods. Michigan, etc., R. R. Co. v. Smithson, 45 Mich. 212; Smith v. Potter, 46 Mich. 258; Ft. Wayne, etc., R. R. Co. v. Gildersleeve, 33 Mich. 133; Huelett v. St. Louis, etc., R. R. Co., 67 Mo. 239; Toledo, etc., R. R. Co. v. Black, 88 Ill. 112, 14 Am. Neg. Cas. 350, *ante*; Toledo, etc., R. R. Co. v. Asbury, Adm'x, 84 Ill. 429, 14 Am. Neg. Cas. 342, *ante*; Indianapolis, etc., R. R. Co. v. Flanigan, 77 Ill. 365, 14 Am. Neg. Cas. 346, *ante*; Whitwain v. Wisconsin, etc., R. R. Co., 58 Wis. 408; Kelley v. Abbott, 63 Wis. 307; Way v. Illinois, etc., R. R. Co., 40 Iowa, 341; Baldwin v. Chicago, etc., R. R. Co., 50 Iowa, 680; St. Louis, etc., R'y Co. v. Higgins, 44 Ark. 293, 13 Am. Neg. Cas. 222." \* \* \* The modification of the requested instruction was reversible error. [S. O. PICKENS, appeared for railway company; W. V. ROOKER, for plaintiff.]

BRAKEMAN COLLIDING WITH SWITCH WHILE ON LADDER OF FREIGHT CAR—FAILURE TO PROVIDE SAFE PLACE—RAILROAD LIABLE.—In PENNSYLVANIA COMPANY v. MCCORMACK, ADM'R, 131 Ind. 250 (*February, 1892*), appeal from judgment for plaintiff in the Bartholomew Circuit Court, in action by administrator of Riley, a brakeman, who was killed by coming in collision with a switch while he was on a ladder of a freight car attending to his duties, judgment was *affirmed*. On the question of duty of railroad company to keep track safe for employees working thereon it was held (as per syllabus to official report) that: "If a railroad company so negligently constructs its

tracks and side tracks, that cars occupying the main line of its track cannot pass cars occupying the adjacent side track without endangering the lives of the employees charged with the duty of moving such cars, its negligence is actionable. If one of its employees is, by reason thereof, killed or injured while in the discharge of his duty, and is himself without fault, and using due care, such company is liable to respond in damages. It was the duty of the company to contemplate that sooner or later cars might have to pass each other at each and every point on the two tracks. It is no defense that those whose acts brought such cars into such dangerous proximity were co-employees with the one injured."

BRAKEMAN INJURED ALIGHTING FROM TRAIN — OBSTRUCTION ON STATION PLATFORM — DANGEROUS PLACE — RAILROAD LIABLE. — In **BROWN v. OHIO & MISSISSIPPI R'Y CO.**, 138 Ind. 648 (*May Term, 1894*), brakeman alighting from train in performance of duties falling over an obstruction on platform of station, thrown upon track and run over by train, losing both legs and sustaining other injuries, judgment rendered for defendant on answers to special interrogatories in the Martin Circuit Court, notwithstanding general verdict for plaintiff for \$10,000, was *reversed*, with instructions to render judgment in favor of plaintiff upon the general verdict. Petition by the railway company for rehearing overruled. The opinion was rendered by HOWARD, J., and the counsel in the case were B. K. ELLIOTT, W. F. ELLIOTT, W. K. MARSHALL, J. A. ZARING, M. B. HOTTEL and H. McCORMICK, for appellant (plaintiff below); H. D. McMULLEN, H. R. McMULLEN, J. HARMON, W. R. GARDINER, S. H. TAYLOR, H. Q. HOUGHTON, J. B. MARSHALL, W. M. RAMSEY, L. MAXWELL and R. RAMSEY, for appellee (defendant below). The case and points decided are stated in the syllabus to the official report as follows:

"It is negligence on the part of a railroad company to place an obstruction consisting of a plank two inches thick upon a depot platform used by passengers and trainmen.

"Where a brakeman upon a freight train is required, in the discharge of his duty, to alight from the moving train while passing a station to receive orders, and does so without any negligence, but by reason of an obstructing plank nailed upon the station platform by the employer is caused to stumble and fall under the train to his injury, the employer is liable in damages.

"In such case, the getting off the moving train, being in the line of duty, is not negligence, even though the platform upon which the brakeman alighted was covered with sleet.

"Where, after a general verdict for a plaintiff, the trial court gives judgment for the defendant upon answers to interrogatories, the Supreme Court, on appeal by the plaintiff, if it finds such answers consistent with the general verdict will not order a new trial, but will remand the case with instructions to render judgment upon the verdict."

BRAKEMAN, IN EMPLOY OF ONE RAILROAD, INJURED BY NEGLIGENT ACT OF AN EMPLOYEE ON TRAIN OPERATED BY ANOTHER RAILROAD — PLEADING — SPECIAL AND GENERAL VERDICT. — In *BALTIMORE & OHIO AND CHICAGO R. R. CO. v. PAUL*, 143 Ind. 23 (*November Term, 1895*), an appeal from judgment for Paul in the Steuben Circuit Court, judgment was *reversed*, the court (per HACKNEY, J.), stating the case, in part, as follows: "The distinct theory of the appellee's complaint was that the appellant was the owner and operator of a line of railway, in the operation of which it employed him as a brakeman; that in the course of said service, the appellant negligently supplied to him certain defective appliances, and negligently employed a reckless and incompetent engineer; that, by reason of such negligence of the appellant, the appellee sustained injuries, for which he sought damages. A jury returned a general verdict in favor of appellee, and answered certain interrogatories. One question in this court arises upon the action of the Circuit Court in overruling the appellee's motion for judgment in its favor, notwithstanding the general verdict. The parties agree in the conclusion that if the answers to the special interrogatories stand in irreconcilable conflict with the general verdict, the verdict must go down, and the appellant should succeed, otherwise that, upon this question, the appellee should succeed. It is also agreed that, in passing upon the alleged conflict, the court should indulge, in favor of the general verdict, every reasonable hypothesis consistent with the issues, and without reference to the evidence. The propositions, in which the parties thus concur, are of constant application, and admit of no doubt. Upon the general verdict and the special answers of the jury, there is no dispute that the appellant owned the railway upon which appellee was injured, but the bitterest conflict arises between the parties as to the issues — that the appellant was operating the line, and that the appellant was the employer of appellee, or in any manner responsible for his misfortune." \* \* \* After setting out the special answers returned by the jury, HACKNEY, J., said: "Reducing these special answers to their exact import, they find that there were two distinct corporations, the appellant [the

Baltimore and Ohio and Chicago Railroad Company] and the Baltimore and Ohio Railroad Company; that the latter company, and not the appellant, owned, controlled and operated the train by which the appellee was injured, and that the appellee was employed by, was serving, and was paid by the latter company. Here is an apparent conflict. The general verdict finds, presumptively, that the appellant was the master of the appellee, and, as such, owed him the duty of protecting him against its negligence in supplying defective appliances and reckless or unskilled co-employees. This was, as we have shown, the theory of the action, and the issue submitted. But the jury find specially that the appellant was not the master of the appellee, and that another owed the duty charged and found generally against the appellant. Can this conflict be reconciled upon any reasonable presumption consistent with the issues?" \* \* \* The court reviewed the question at length and its ruling is stated in the headnote to the official report as follows:

"A railroad company is not liable for an injury to a brakeman in the service of another railroad company, caused by the negligence of his fellow-servant on a train owned and operated by his employer, merely because the injury was received while the train was running on the road of the former.

"A general verdict for plaintiff in an action for negligent injuries, under a complaint based on the theory that a brakeman was employed by defendant, is overthrown by special answers to interrogatories to the effect that plaintiff was not in defendant's employ, but in the employ of another railroad company, which owned, controlled, and operated the train which injured him."

The court cited *Parker v. Penn. Co.*, 134 Ind. 673; *Faris v. Hoberg*, 134 Ind. 269; *Woodruff, Adm'x, v. Bowen*, 136 Ind. 431; and discussed the cases of *East Line, etc., R'y Co. v. Culberson*, 72 Tex. 375, and *Macon, etc., R. Co. v. Mayes*, 49 Ga. 355, 14 Am. Neg. Cas. 227, *ante*.

The judgment in the Paul case, *supra*, was reversed, with instructions to sustain the appellant's motion for judgment *non obstante*. (Petition for rehearing was overruled, December 12, 1895.) J. H. COLLINS and J. E. ROSE, appeared for appellant; R. W. McBRIDE, W. L. PENFIELD and L. M. NINDE, for appellee.

## SPENCER v. OHIO AND MISSISSIPPI RAILWAY COMPANY.

*Supreme Court, Indiana, January, 1892.*

[Reported in 130 Ind. 181.]

**EMPLOYEE, UNDER ENGINE CLEANING IT, INJURED BY STARTING OF ENGINE — FAILURE TO NOTIFY ENGINEER — CONTRIBUTORY NEGLIGENCE.** — Where an inexperienced person was employed to clean locomotives in a railroad yard, and got under a locomotive to perform such work, without first notifying the engineer in charge thereof, he was guilty of contributory negligence and could not recover for injuries sustained by the starting of the engine while he was under same.

**INEXPERIENCED SERVANT — DEGREE OF CARE — PRESUMPTION.** —

A railroad company has the right to presume that its servant, although inexperienced in the work he was called upon to perform, would exercise some degree of care to avoid injury or place himself in a dangerous position.

**FELLOW-SERVANT.** — If there was negligence on the part of the employees of a railroad company, either in ordering a servant to clean the engine, or of the engineer in starting the engine while the servant was under it, it was the negligence of a fellow-servant, for which the railroad company was not responsible.

**INCOMPETENT SERVANT — PLEADING AND PROOF.** — In order to hold a railroad company liable for incompetency of a servant resulting in injury to another servant, the latter must allege and prove that he himself was ignorant of the incompetency of his fellow-servant (n).

**APPEAL from the Jackson Circuit Court.** The facts appear in the opinion. *Judgment affirmed.*

**I. CHICAGO & EASTERN ILLINOIS R. R. Co. v. BEATTY, ADM'R,** 13 Ind. App. 604 (May Term, 1895); employee, engaged in cleaning and wiping locomotives in defendant's round house, run over and killed by a locomotive alleged to have been carelessly run by an engineer, whose incompetency was alleged as a cause of the accident; judgment for plaintiff in the Clay Circuit Court for \$3,000 was *affirmed*; rehearing denied.

In BOGARD, ADM'R, *v. LOUISVILLE, EVANSVILLE & ST. LOUIS R'Y CO.*, 100 Ind. 491 (November Term, 1884), it was held that a master is not liable in damages to an employee or servant for injuries resulting from the negligence of a co-employee or fellow-servant engaged in the same general employ-

ment, unless the master has been guilty of negligence in the employment of, or, after notice, continuing in its employment, the negligent or incompetent employee through whose negligence the injury was caused. Citing Indiana Car Co. *v. Parker*, 100 Ind. 181, 14 Am. Neg. Cas. 422, *ante*; Boyce *v. Fitzpatrick*, 80 Ind. 526, 14 Am. Neg. Cas. 443, *ante*; Brazil Coal Co. *v. Cain*, 98 Ind. 282, 14 Am. Neg. Cas. 480, *ante*, etc. In this case, an employee, a teamster hauling rock from a deep cut on defendant's road, was killed by a heavy rock which struck him after an explosion following a blast by other employees. It was held that the teamster and those engaged in blasting rock were fellow-servants, all being in the service of the same common master.

W. K. MARSHALL, for appellant.

J. B. BROWN, W. M. RAMSEY, L. MAXWELL, R. RAMSEY and E. BARTON, for appellee.

**Miller, J.** — The sole question is whether the amended complaint states a cause of action. It alleges, in substance, that on December 12, 1888, the company employed plaintiff to work in her round-house and yard adjoining, at Seymour, and that a part of his duty was to clean her engines of ashes and fire when they came into the yard; that he was required to work under the orders of other men until he should learn the business himself, to wit, under the directions of James Sutton, David Quinn and Charles Collmeyer, plaintiff himself being inexperienced; that on the night of December 28, 1888, engine 133 came into the yard, and while it was standing on a switch-track to be cleaned, he was ordered by the above-named persons to go with one of them to clean it; that in order to do said work it was necessary to take off a valve held by a chain that was broken, and was tied by another chain; that when plaintiff untied the chain the valve dropped down upon the ground, under the engine, midway between the rails, making it necessary for plaintiff to place his head, shoulders, arms and the upper part of his body under the engine boiler to get the valve, which he did; that while he was thus getting the valve, the engineer, who knew he was cleaning the engine, carelessly and negligently started it and ran it upon plaintiff, thus causing his injuries; that the condition of the chain and valve rendered the machinery dangerous and unsafe, and exposed plaintiff to unnecessary hazard; that it had been in that condition for more than ten days, and defendant knew it was in said broken and unsafe condition, and negligently permitted it to remain so, and plaintiff did not know that it was broken and unsafe until he went to said engine to clean it; that defendant knew of plaintiff's inexperience, and failed to give him any warning of the dangers of the work; that the person in charge of the engine, and running it while in the yard, was in defendant's employ, and had been for more than a year prior to that time, and was negligent in the performance of his duties, and was especially negligent in the performance of his said duty with said engine, and was not a skilled or practical engineer, and was incompetent and only a yard hand, without experience in running or managing locomotive engines, and was by defendant's orders put at said service; that the defendant knew he was

negligent and careless, and defendant was negligent and careless in employing him, and retaining him in its service; that plaintiff was without fault or negligence in all he did as aforesaid, and received his said injuries without fault or carelessness on his part.

It appears from the allegations of the foregoing complaint that the fact that the chain which held the valve was broken was not the proximate cause of the injury. It was the starting of the engine while the appellant was under it that caused the injury complained of. *Pease v. Chicago, etc., R'y Co.*, 61 Wis. 163.

It was not negligence on the part of the persons under whose direction he was working to order him to clean the engine, which at the time was standing still on the track. They had the right to presume, although he was inexperienced in the work, that he would exercise some degree of care to avoid injury. They did not order him to go under the engine, or, for anything that appears in the complaint, have any reason to suppose that he would place himself in that dangerous position. *Atlas Engine Works v. Randall*, 100 Ind. 293, 14 Am. Neg. Cas. 438, *ante*.

It is not alleged that he notified the engineer or other persons in charge of the engine that he was going under it, or that they had any notice or knowledge of that fact. Under the circumstances it does not appear that the employees in charge of the engine were guilty of negligence in putting it in motion; but it does appear that the appellant was guilty of negligence, contributing to the injury, in placing himself in this dangerous position without first warning the engineer. It was the assumption of a needless risk on his part. The general averment of want of negligence on his part is controlled by the specific allegations of fact which show that he was negligent. *Jeffersonville, etc., R. R. Co. v. Goldsmith*, 47 Ind. 43.

If there was negligence on the part of the employees of the company, either in ordering him to clean the engine, or of the engineer in starting the engine, it was the negligence of a co-employee, for which the appellee is not responsible. *Wilson v. Madison, etc., R. Co.*, 18 Ind. 226; *Gormley v. Ohio, etc., R'y Co.*, 72 Ind. 31; *Ewald v. Chicago, etc., R'y Co.*, 70 Wis. 420; *Pease v. Chicago, etc., R'y Co.*, 61 Wis. 163; *Bergstrom v. Staples*, 82 Mich. 654.

The allegations charging that the servant in charge of the engine was not a skilled or practical engineer, but was incompetent, and that the defendant was negligent and careless in employing

and retaining him in its service, falls short of taking the case out of the general rule, that the master is not liable for injuries caused by the negligence of a co-employee. In order to do so it must be alleged, in addition to the charges of negligence on the part of the master, that the plaintiff was himself ignorant of the incompetency of his fellow-servant. *Lake Shore, etc., R'y Co. v. Stupak*, 108 Ind. 1; *id.*, 123 Ind. 210; *Indiana, etc., R'y Co. v. Dailey*, 110 Ind. 75; *Rogers v. Leyden*, 127 Ind. 50 (1).

We are unable to find in this complaint any averment negativing knowledge on the part of the appellant of the alleged incompetency of the engineer.

We find no error in the record. Judgment affirmed.

**CAR REPAIRER, WORKING ON FLAT CAR, KILLED BY TRAIN WHICH WAS RUN AGAINST THE CAR WITHOUT SIGNAL.** — In **LOUISVILLE, EVANSVILLE & ST. LOUIS CONSOLIDATED R'Y CO. v. HANNING**, ADM'R, 131 Ind. 528 (*May, 1892*), judgment for plaintiff in the Dubois Circuit Court was affirmed. Plaintiff's intestate was a car repairer in defendant's employ, and while working upon a flat car standing on a side track was crushed and killed by a locomotive and train of cars which was run upon said track and against said flat car without any signal from the defendant (2). On the question of duty of master to

1. Reported with the Indiana cases in this volume of Am. Neg. Cas.

2. See also the following cases relating to injuries to car repairers:

In **HILDEBRAND, ADM'R, v. TOLEDO, WABASH & WESTERN R'Y CO.**, 47 Ind. 399 (November Term, 1874), employee, a carpenter, while repairing one of defendant's cars on side track, killed by train which struck car, judgment in the Carroll Circuit Court was reversed. It was held that "a complaint against a railroad company, in an action for damages for injury to the person of an employee, causing death, which charges that the company itself, by its negligence and unskillfulness in the management, etc., of its engines and cars, etc., caused the injury complained of without any fault of the deceased, does not raise the question of the liability of the company for the negligence of its

servants by which a fellow-servant is killed or injured, and is good on demurrer." Held, also, that "a complaint in such an action which fails to allege that there was no negligence on the part of the deceased is bad on demurrer."

In **DAY v. CLEVELAND, COLUMBUS, CINCINNATI & ST. LOUIS R'Y CO.**, 137 Ind. 206 (November Term, 1893), it was held (as per syllabus to the official report) that: "Where a railroad employee, a car repairer and carpenter, in helping to move a car upon the track, took a position at the draw-bar, under the running board, one end of which rested on the car which was being moved and the other end on another car, one end of which, when the car had been moved far enough, fell on the employee, injuring him the employee being ignorant of the fact that such board had not been removed, but

furnish safe place to work and the servant's assumption of risks, the court (per McBRIDE, J.) said:

"No authority need be cited in support of the firmly settled rule requiring the master to use at least ordinary care to furnish to his employees a reasonably safe place to work. The term 'safe place to work,' as thus used, is, of course, necessarily relative. It does not mean a place absolutely free from danger, as some vocations from their very nature involve the constant encountering of danger.

"The rule is equally well settled that a servant impliedly assumes all the ordinary and usual risks incident to his service, so far as they are known to him, or so far as one of his age and experience ought, in the exercise of ordinary care, to be able to discern them, even where the duties of the service are necessarily hazardous. *Brazil Block Coal Co. v. Hoodlet*, 129 Ind. 327, 14 Am. Neg. Cas. 474, *ante*, and authorities there cited. If, however, the master requires of him a service outside of the duties ordinarily incident to his employment, and subjecting him to additional danger, he does not necessarily assume the additional hazard in undertaking to perform the unusual and extra service, even although the dangers attending it are obvious." \* \* \*

"Here a service was required of the decedent outside of the line of his employment, and at a place other than that provided for the performance of his regular and ordinary duties. The averments of the complaint show that he was required to perform this service, in the particular place indicated, by the direction of his superior, to whose orders he was subject. Its performance would subject him to great danger, unless certain precautions were observed in the placing of signal flags. These dangers grew out of the place in which he was required to work, and were, it is averred, unknown to his regular employment. It is also averred that these dangers could be entirely obviated by the placing of the flags. With the flags properly placed it was a safe place in which to work." \* \* \*

The court cited and quoted with approval the cases of *Taylor v.*

which he could easily have seen if he had looked, the danger being as obvious to the employee as to the employer — the employee cannot recover, and, in such case, it is the duty of the trial court to instruct the jury to find for the defendant, the employer." Judgment for defendant in the Marion Superior Court affirmed.

*EVANSVILLE & TERRE HAUTE R. R. CO. v. HOLCOMB*, 9 Ind. App. 198 (No-

vember Term, 1893); car repairer, while at work on track, injured by an engine running against cars on repair track; judgment for plaintiff in the Posey Circuit Court affirmed; injuries, hips crushed and ribs broken; full discussion, with numerous authorities, on the duty of master to furnish safe place to work, etc., in the opinion rendered by GARVIN, J.

Evansville, etc., R. Co., 121 Ind. 130; Harrison *v.* Detroit, etc., R. Co., 79 Mich. 409; Brazil Block Coal Co. *v.* Young, 117 Ind. 520, 14 Am. Neg. Cas. 481, *ante*; Cincinnati, etc., R'y Co. *v.* Lang, 118 Ind. 579; Penn. Co. *v.* O'Shaughnessy, 122 Ind. 588; Cincinnati, etc., R'y Co. *v.* Roesch, 126 Ind. 445; Louisville, etc., R'y Co. *v.* Graham, 124 Ind. 89; Penn. Co. *v.* Whitcomb, 111 Ind. 212, 14 Am. Neg. Cas. 505, *ante*; Krueger *v.* Louisville, etc., R'y Co., 111 Ind. 51; in support of the doctrine enunciated that an employee does not assume extra-hazardous risks.

[The Indiana cases cited are reported in this volume of AM. NEG. CAS.]

**ENGINEER KILLED IN COLLISION — DEFECTIVE APPLIANCES — CONTRIBUTORY NEGLIGENCE — INJURED EMPLOYEE SERVANT OF ANOTHER COMPANY — INEVITABLE ACCIDENT — PLEADING — COMPLAINT — DEMURRER.** — In **EVANSVILLE & TERRE HAUTE R. R. CO. v. KRAPF, ADM'R**, 143 Ind. 647 (*November Term, 1895*), judgment for plaintiff in the Vigo Superior Court was *reversed*, with instructions to sustain the demurrer to the first paragraph of the complaint, and to sustain motion for new trial. The action was for damages for death of plaintiff's intestate, an engineer, killed in a collision, caused by alleged defective appliances (1). The Supreme Court (per McCABE, J.) reviewed the case at length and set out the complaint (demurrer to which was overruled by the trial court) as follows:

"The complaint was in three paragraphs, a demurrer to each was overruled, and that ruling is assigned for error in this court. The first paragraph, omitting the formal parts, reads as follows: 'That the decedent, George J. Krapf, on the 29th day of July, 1890, and for thirty-seven years prior thereto, was an employee of the Indianapolis and St. Louis Railway Company as an engineer, and on said day, and for a long time prior thereto, was employed as a switch

1. See also the following cases relating to injuries to engineers:

In **INDIANAPOLIS & CINCINNATI R. R. CO. v. LOVE**, 10 Ind. 554 (May Term, 1858), engineer injured and leg crushed in a derailment of the train caused by alleged defective roadbed, it was held that negligence of the railroad company must be alleged and proved. It was also held that "there is no implied warranty, generally, of the completeness or fitness of the road or rolling stock, as between the company and

their employees." It seems, that where an injury to a railroad employee resulted from his own negligence or carelessness in failing to discharge some reasonable duty, or where the employee and the company were equally to blame for the injury, the company is not liable.

The ruling in the *LOVE* case, *supra*, was *affirmed* in **INDIANAPOLIS & CINCINNATI R. R. CO. v. KLEIN**, 11 Ind. 38 (May Term, 1858), which latter case was an action by a brakeman whose

engineer in the switching yards of said railway company in the city of Terre Haute, Indiana; that on said day, and for many years prior thereto, there was an agreement and contract for a valuable consideration between the said railroad company and the said defendant, the Evansville and Terre Haute Railroad Company, that all cars of defendant which should come into or be found in the yards of said Indianapolis and St. Louis Railway Company in said city should be delivered by said Indianapolis and St. Louis Railway Company to defendant in the switching yards of defendant in said city, and for said purpose the said Indianapolis and St. Louis Railway Company had the right and was accustomed, by the terms of said contract, to enter upon the land of said defendant at all hours; that pursuant to said agreement, on the day aforesaid, the decedent, by the direction of his employer, pulled a train of freight cars belonging to defendant from the yards of his employer to the yards of defendant for the purpose of delivering the same to defendant, the decedent acting at his post of duty as engineer of the engine attached thereto; that decedent ran his said train into the said yards of defendant upon the main track thereof, as had been the custom to do theretofore, as he had a right and as it was his duty to do, and at a speed of about four miles per hour; that upon the decedent's entering the yards of the defendant, the said defendant backed a long train of freight cars toward the train of decedent and upon the same track upon which the train of the decedent was moving, and defendant's train running at a speed of eight miles per hour; that decedent, seeing the said cars moving toward him, whistled for down brakes, signaled the approaching train to stop, and reversed his engine to stop his own train, and the engineer of defendant's train, upon receiving the signal, reversed his engine, whereupon a cut of seven cars broke loose from defendant's train, and, by their acquired momentum, ran into and against the engine of said decedent, who, remaining at his post of duty, was caught

hand and several fingers were crushed in a derailment of the train caused by the breaking of an axle of one of the cars. In this case judgment for plaintiff for \$2,000 in the Shelby Circuit Court was affirmed.

In PENNSYLVANIA Co. v. RONEY, Adm'x, 89 Ind. 453 (May Term, 1883), engineer killed in collision caused by switch being negligently left open by another employee, judgment for plaintiff in the Superior Court of Allen county was affirmed, the company being

liable for negligence of incompetent servant.

In EVANSVILLE & TERRE HAUTE R. R. Co. v. TOHILL, Adm'x, 143 Ind. 49 (November Term, 1895), action for negligent killing of plaintiff's intestate, an engineer, in a collision between two freight trains, judgment for plaintiff in the Sullivan Circuit Court was reversed, with instructions to the Circuit Court to sustain the appellant's [railway company] motion for judgment on the special verdict.

in the wreck between the cab and water tank of his engine and killed without fault or negligence upon his part, but by reason of the negligent conduct of defendant in this, to wit: That defendant was carelessly and negligently using in its train aforesaid, at the time aforesaid, a defective and worthless car, with a defective and insecure draw-bar therein, and a defective key in said draw-bar, and that the timbers to which said draw-bar was attached were decayed and rotten and insufficient for that purpose; that defendant had carelessly and negligently constructed said car, and had carelessly and negligently suffered the same to become defective and out of repair, and had carelessly and negligently used and suffered the said defective car and defective coupling to be used in making up said train upon the day aforesaid, by reason of all of which facts, when defendant's engine was reversed, as aforesaid, the draw-bar in said defective car pulled out, the decayed timber of the car gave way, and the seven cars were precipitated against the decedent, causing his death, as aforesaid." \* \* \*

The points decided are stated in the syllabus to the official report as follows:

"A complaint for the death of an engineer on a freight train — alleged to have been caused by a defective draw-bar and coupling appliances on one of the cars of another freight train, causing it to break apart and a section of the train to collide with his engine after both engines had been reversed upon discovering that the trains were approaching each other on the same track — is bad where it does not show that the engine attached to the colliding train was reversed in time to prevent a collision if the draw-bar and appliances had not been defective and the train had not broken in two.

"A general averment in a complaint for the death of a railway employe, that his injuries were inflicted without fault or negligence on his part, sufficiently alleges the absence of contributory negligence to withstand a demurrer, where the facts alleged therein do not necessarily raise an inference of contributory fault.

"A complaint alleging that defendant railway company while carelessly and negligently backing a train failed to provide a clear track for the train of the deceased engineer, or to take any precaution against injuring him by other trains, and carelessly omitted to provide a flagman or other means of warning of the approach of any train, and that he was killed by the backing of the train at a high rate of speed against his engine, states a cause of action, although it does not recite all the facts and circumstances tending to show defendant's negligence.

"The breaking without fault or negligence of a draw-bar and coupling-pins holding freight cars together, which were in good condition and apparently sound, caused by the momentum of the freight train upon the engine being reversed upon discovering the approach of another train with which a section of the train breaking apart collided, killing the engineer, who was in the employ of another company and then engaged in taking freight cars home to defendant's yards, is an inevitable accident for which defendant is not liable.

"One of two railway companies which daily takes each other's freight cars home to its yards, without either company taking any other precaution than to preserve a sharp lookout to prevent collisions, is not liable for the death of an engineer of the other company by a collision while he was bringing its freight cars home, which would not have occurred if he had exercised due precaution to keep a proper lookout and notify him of the approach of its train, where his own neglect to observe similar precautions proximately contributed to the accident."

FIREMAN INJURED IN COLLISION BETWEEN TRAINS — NEGLIGENCE OF ENGINEER — FELLOW SERVANT — REMOTE AND PROXIMATE CAUSE. — In NEW YORK, CHICAGO & ST. LOUIS R. R. CO. v. PERRIGUEY, 138 Ind. 414 (*June, 1894*), judgment for plaintiff for \$12,000 in the Wells Circuit Court was *reversed*, on the ground that the general verdict returned by the jury was in irreconcilable conflict with the answers to the special interrogatories also returned by the jury. It was also held that the motion of appellant railway company for judgment *non obstante veredicto* should have been sustained. Petition for rehearing was also overruled. A. ZOLLARS, J. MORRIS, R. C. BELL, J. M. BARRETT and S. J. MORRIS, appeared for appellant; L. M. NINDE, H. W. NINDE and W. L. PENFIELD, for appellee. The opinion was rendered by HACKNEY, J., and on the hearing of petition for rehearing the opinion by HACKNEY, J., overruling the motion was concurred in by HOWARD, J., in a separate opinion. The facts and points decided are sufficiently stated in the syllabus to the official report as follows:

"A., as engineer, was in charge of engine No. 172, which he was required to operate with a defective headlight. A. had special orders to stop at S., and remain until engine No. 167 passed. A. stopped at S., but in violation of such order pursued his journey with the defective engine, before No. 167 had passed. After leaving S. two and three-quarter miles, and having observed the

approach of No. 167, A. stopped his engine when one and a quarter mile distant from No. 167, there being upon the front of No. 172 two green lights burning brightly, and on board were handlamps to be lighted and placed in the headlight when it failed for any reason, which, when placed in the headlight, could be seen for the distance of five miles, but on this occasion they were not so placed, and no headlight was burning. From S. eastward the track was straight and free from obstruction, with a decline in the grade for four miles. No. 167 came from the east at the rate of thirty miles an hour, and her engineer and fireman having looked but failed to observe No. 172, collided with the same, in which collision B., the fireman on No. 172, was injured, for which injury he sued the railroad company for damages. *Held*, that the proximate cause of B.'s injury was the negligence of A., a fellow-servant of B., in not obeying the order given him to remain on the side track at S. until No. 167 passed, and in failing to place the lighted handlamps in the headlight. *Held, also*, that the negligence of the railroad company in failing to furnish a proper headlight was a remote cause of the injury. *Held, also*, that the negligent omission of the company to furnish a proper headlight, and the negligent acts of A. were not concurrent in causing the injury."

The court in the PERRIGUEY case (preceding paragraph) cited numerous cases on the question of remote and proximate cause, namely, Lewis *v.* Flint, etc., R'y Co., 54 Mich. 55; Milwaukee, etc., Co. *v.* Kellogg, 94 U. S. 469; Alexander *v.* Town of New Castle, 115 Ind. 51; Terre Haute, etc., R. Co. *v.* Buck, 96 Ind. 346; Billman *v.* Indianapolis, etc., R. Co., 76 Ind. 166; Scheffer *v.* R. R. Co., 105 U. S. 249; Carter *v.* Towne, 98 Mass. 567; Vicars *v.* Wilcocks, 8 East, 1; Crain *v.* Petrie, 6 Hill, 552; Tisdale *v.* Inhab. of Norton, 8 Met. 388; Anthony *v.* Slaid, 11 Met. 290; Silver *v.* Frazier, 3 Allen, 382; Bosch *v.* Burlington, etc., R. Co., 44 Iowa, 402; Dubuque, etc., Ass'n *v.* City, etc., of Dubuque, 30 Iowa, 176; Daniels *v.* Ballantine, 23 Ohio St. 532, and McClary *v.* Sioux City, etc., R. Co., 3 Neb. 44.

**PITTSBURGH, CINCINNATI AND ST. LOUIS  
RAILWAY COMPANY V. ADAMS.**

*Supreme Court, Indiana, November Term, 1885.*

[Reported in 105 Ind. 151.]

**MINOR EMPLOYEE INJURED — PLEADING — COMPLAINT — MOTION TO MAKE MORE CERTAIN.** — Where the complaint in an action against a railroad company for personal injuries to plaintiff while in its employ, resulting from the alleged negligence of the defendant and its employees, charges that the plaintiff was ordered to perform certain hazardous work with which he was unacquainted, by "his superior in rank in the service" of such defendant, whereby, etc., the same is not sufficiently specific, and a motion to require the plaintiff to make his complaint more certain, so as to show the position in the defendant's service, and the relation to both defendant and plaintiff, occupied by the persons alleged to have given such orders to him, should be sustained.

**SPECIAL VERDICT.** — A special verdict should be limited to the case as made by the pleadings, should find all the facts proven under the issues, and should not embody or state conclusions of law.

**SPECIAL VERDICT — CONCLUSIONS OF LAW, ETC. — *VENIRE DE NOVO.*** — If a special verdict include findings of evidence, conclusions of law and matters outside the issues, such findings will be disregarded; still, if such verdict, stripped of such superfluities, is yet sufficient to lead up to and support a judgment either way under the issues, a motion for a *venire de novo* will be overruled.

**MASTER AND SERVANT — CONTRACT OF HIRING — IMPLIED UNDERTAKING OF MASTER — CO-EMPLOYEE — VICE-PRINCIPAL.** — As a general rule, in the contract of hiring, there is an implied undertaking upon the part of the master that he will use all reasonable care to furnish safe premises, machinery and appliances for conducting the business safely, and that he will use all reasonable care to furnish competent and prudent co-employees; and when the master has kept and performed this implied undertaking, the servant cannot recover from him for injuries resulting from the business, or the negligence of such co-employees, however dangerous the business; and this rule obtains, regardless of the fact that one employee may be the superior in rank to others in the same general employment, unless he occupies the position of vice-principal.

**MASTER AND SERVANT — CONTRACT OF HIRING — IMPLIED UNDERTAKING ON PART OF SERVANT.** — In such contract of hiring, there is an implied undertaking on the part of the servant that he will exercise reasonable care to avoid injury, and that he assumes all ordinary risks incident to the business, and all risks from the negligence of co-employees.

**RULE AS TO MINOR EMPLOYEES.** — The forgoing general rules governing the relationship of master and servant apply to minor employees.

**MASTER'S LIABILITY WHERE SERVANT IS ORDERED TO DO HAZARDOUS WORK OUTSIDE OF CONTRACT.** — The servant's implied assumption of risks, which accompanies and is a part of the contract of

hiring, is confined to the particular work and class of work for which he is employed, and if the master orders him to work temporarily in another department of the general business, where the work is of such a different nature and character that it cannot be said to be within the scope of the employment, and where he is associated with a different class of employees, he will not, by obeying such orders, necessarily assume the risks incident to the work and the risks of negligence on the part of such employees.

#### **ASSUMPTION BY SERVANT OF HAZARDS OUTSIDE OF CONTRACT OF HIRING.**

— If, however, the servant, voluntarily and without directions from the master, goes into hazardous work outside of his contract of hiring, he puts himself beyond the protection of the master's implied undertaking.

**DEFECTIVE MACHINERY, ETC. — KNOWLEDGE.** — If the servant claims damages from the master for injuries received on account of defective premises, buildings, machinery or appliances, he must allege and prove that the defect or the unfitness, which caused the injury, was known to the master, or was such as with reasonable diligence and attention to his business he ought to have known.

**LATENT DEFECTS AND DANGERS.** — In all cases the master is bound to disclose to the servant latent defects and dangers, of which he has knowledge, or of which he ought to have knowledge by the exercise of reasonable attention, care and diligence, and of which the servant has no knowledge, and would not discover by the exercise of reasonable care.

**COMPETENCY OF SERVANT — IMPLIED REPRESENTATIONS.** — When a person of apparently sufficient age, physical ability and mental caliber to perform the service, seeks an employment at the hands of a railway company, or other master, he will be held to an implied representation that he is competent to perform the duties of the position he seeks, and competent to apprehend and avoid all dangers that may be discovered by the exercise of ordinary care and prudence.

**HAZARDOUS WORK — ORDERS BY CO-EMPLOYEE.** — If a servant, upon the orders of a co-employee, employed in the same work with him, and without authority from the master to order and control the servant's work and movements, leaves his work which in the original contract he is hired to perform, and engages in hazardous work, he cannot make the master respond in damages for the consequences.

**CONTRIBUTORY NEGLIGENCE.** — In no case will the master be held as upon a warranty against the negligence of the servant who brings injury upon himself which he might have avoided by the exercise of reasonable care and prudence (1).

[The action was brought by plaintiff, a section-hand in defendant's employ, who was injured while attempting to couple cars under orders of an alleged superior, a sharp piece of iron which projected from the rail piercing the pantaloons of his right leg, passing through same to his right foot, holding him fast, and the wheels of the train and cars he was coupling ran over and crushed his foot, etc. At the time of the accident plaintiff was under twenty-one years of age.]

x. With slight changes the syllabus to the ADAMS case (the case at bar) is that made to the official report of the case, the language of which is mainly that of the opinion rendered by ZOL-  
LARS, J., who reviewed at length the rules governing the law of master and servant.

FROM the Miami Circuit Court. The case is stated in the opinion. *Judgment for plaintiff reversed.*

N. O. ROSS, for appellant.

J. L. FARRAR, J. FARRAR, W. C. FARRAR, A. C. HARRIS and W. H. CALKINS, for appellee.

**Zollars, J.** — Appellee brought this action to recover damages resulting from a personal injury received upon appellant's road. The following, partly a summary and partly a copy, is as much of the complaint as needs to be set out, viz.:

In 1881, appellee, then under twenty-one years of age, was in the employ of appellant as a section hand, and in no other different capacity. While thus employed, he was "ordered by Patrick Clary, a person standing towards plaintiff in the relation of superior in the employ of defendant," to get upon and go with a construction train, and perform such service as might be required of him. The construction train was sent out for the purpose of gathering up iron along the track. "In obedience to said order, though totally unacquainted with the business of coupling cars, braking, or the general method or order of running trains, \* \* \* except as a section hand," appellee went upon the train. There were not upon the train the usual and necessary number of brakemen to manage and control it. While upon the train, appellee was "ordered by said Patrick Clary, his superior in authority in defendant's employ as aforesaid, to act as brakeman at the rear end of the train, a business for which he was not hired, and of and about which he knew nothing." He obeyed the order, and while so acting as brakeman it became necessary to couple other cars to the rear end of the train. Being at the rear end of the train, and after it was upon the side track to let other trains pass, he "was ordered by Thomas Courtney, in the employ of defendant, and standing toward plaintiff in the relation of superior, to do said coupling. While performing said coupling as ordered by his said superior in service, and as in duty bound to do, without fault or negligence on his part, the bottom of plaintiff's pantaloons upon his right leg was pierced by a sharp piece of iron negligently left by defendant projecting from the rail of defendant's said road, which defendant at said place had negligently and carelessly suffered to get and remain out of repair; said iron, after passing through the leg of plaintiff's pantaloons, entered the shoe upon plaintiff's right foot and held him fast, and before he could extricate his

\* \* \* foot, and without fault or negligence upon his part, the wheels of the train and cars he was coupling ran upon and over the said right foot of plaintiff, crushing, mangling and bruising said foot and the ankle, rendering amputation necessary," etc.

The foregoing statement is an abbreviation of the second paragraph of the complaint. The first paragraph is substantially the same, except that the coupling is alleged to have been a duty resulting from the position of brakeman, and there is no averment that appellee received specific orders from any one to make the coupling.

Appellant moved for a rule upon appellee to make his complaint more specific and certain, so as to show the position in its service, and the relation to it and to appellee, occupied by Clary and Courtney, the persons alleged to have given the orders to appellee. We shall see during the course of this opinion that this motion should have been sustained.

It is assigned as error that the court below erred in overruling appellant's demurrer to the complaint.

The contention on the part of appellant's counsel, amongst other things, is, that it is not alleged that appellant knew, or with reasonable care might have known, of the unsafe condition of the rail, and that it is not alleged that appellee did not know, or with reasonable care might not have known, that the rail was in an unsafe condition. Upon the hypothesis that the gravamen of the action is alone the negligence of appellant in connection with the rail, and that to constitute negligence in that regard it is essential that appellant knew, or with reasonable care might have known, of its unsafe condition, still, the general averment that appellant negligently left the sliver or splint projecting from the rail, is sufficient under many decisions of this court. Cleveland, etc., R'y Co. v. Wynant, 100 Ind. 160, and cases there cited. And so, too, in relation to the general averment that appellee was without fault or negligence.

Whether or not these former rulings are in entire consonance with the provisions of the Code upon the subject of pleading we need not now inquire. They have been so long adhered to as to become the settled law of the State.

The jury returned the following special verdict, upon which judgment for \$7,000 was rendered against appellant and in favor of appellee, viz. :

" The defendant, the Pittsburgh, Cincinnati and St. Louis Railway Company, was, on the 9th day of June, 1881, and long previous thereto, a corporation organized and doing business under the laws of the State of Indiana, and operating a line of railroad through the counties of Grant and Miami in the State of Indiana.

" 2. That, on June 9, 1881, plaintiff was a minor under the age of twenty-one years, over the age of twenty years, and was employed by the defendant as a section hand to work repairing the track of defendant's said railroad.

" 3. Plaintiff was so employed to work for defendant without the consent of his mother.

" 4. When plaintiff was so hired to work as a section hand on defendant's road, his father was not living.

" 5. On June 9, 1881, plaintiff was ordered by defendant's section boss having charge of the section from Bunker Hill to McGrawsville, one Patrick Clary, to go upon defendant's construction train at Bunker Hill, Indiana, and plaintiff did go upon said train as ordered.

" 6. Plaintiff went from Bunker Hill on said day, under direction of defendant's agents and employees, to Upland, in Grant county, Indiana.

" 7. Plaintiff, previous to June 9, 1881, had never performed the duties of brakeman, and he had never coupled cars attached to an engine.

" 8. Plaintiff, while so on said train at Upland, on June 9, 1881, was ordered by defendant's agent and plaintiff's superior in authority, to go to the rear of said construction train and act as brakeman thereon, and plaintiff obeyed said order.

" 9. While so on the rear end of said train as brakeman, it was plaintiff's duty to couple cars of said construction train on which he was working.

" 10. Plaintiff was ordered while at Upland by an agent of defendant, and a superior in authority to plaintiff, to couple some cars to said construction train. He attempted to couple said cars, and while so attempting to couple said cars he was injured by the cars of said construction train, and his right leg was so badly crushed that amputation became and was necessary.

" 11. At Upland, on said June 9, 1881, while so attempting to couple cars on said train upon which plaintiff was working, and when he received said injury, he was, when so injured, exercising reasonable care in coupling said cars.

" 12. That plaintiff, on said day, while so as aforesaid attempting to couple said cars, exercised such care as might reasonably have been expected of him, considering his youth and inexperience.

" 13. While so attempting to couple said cars at Upland, on the said 9th day of June, 1881, plaintiff's foot was caught by an iron sliver or splinter on one of the rails of defendant's switch, and held there until struck by the car wheel of said construction train, and his leg was then and there run over by said car wheel and crushed, so that amputation became and was necessary, and plaintiff thereby lost his right leg.

" 14. We further find, that while the train upon which plaintiff was ordered by defendant to go, and did go to Upland, was standing upon the side-track, a part of defendant's railway at Upland, in Grant county, Indiana, on June 9, 1881, the plaintiff was ordered, by an employee of defendant and superior to plaintiff in authority on said railway, to make the coupling of certain cars attached to the locomotive of the train on which plaintiff was working; that in attempting to obey said order to couple said cars, without fault or negligence on his part, the said cars ran upon and over his right leg, and so injured the same that amputation became necessary; and we further find that the defendant was on the cars and train upon which plaintiff was working at said time at Upland when he so lost his leg, in the person of Andrew Mertens, supervisor of and on said road. We do further find, that at the time plaintiff was ordered to go on defendant's construction train at Bunker Hill, on June 9, 1881, he was under the age of twenty-one years and over twenty years; that he had no experience whatever in railroading, except as a section hand; that defendant ordered him to couple cars at Upland on said day, and that he did make the attempt as ordered, and, without fault on his part, was injured and lost his leg thereby, and that neither defendant nor any one of her employees had explained, or did explain, to plaintiff, or caution him of the hazard or danger incident to braking on said train or coupling cars, and that neither the defendant nor any one of her employees had explained to plaintiff, or instructed him how to avoid, the danger incident to such business.

" 15. We find that the defendant was careless and negligent in allowing said sliver or splinter to remain upon and protrude from said rail on said switch.

" 16. We further find that said defendant ran said train from Bunker Hill to Upland without brakemen, and that it was negligent in so running said train from Bunker Hill to Upland without any brakemen.

" 17. The supervisor of defendant's road, who had charge on said day of all of defendant's road from Logansport to Hartford City, was on said construction train in charge of the hands thereon, and directed that plaintiff be ordered to the rear of the train to act as brakeman and couple cars on said train.

" 18. Plaintiff had never, previous to June 9, 1881, had any experience in railroading, except as a section hand on defendant's road and in work on the track.

" 19. That said plaintiff was, by said injury so received, made lame, sick and sore, and suffered by reason of said injury great distress of mind and body, and the loss of his leg, permanently injuring him.

" 20. That said injury was caused by the wrongful act of said defendant.

" 21. We find it was negligence on the part of the defendant to order an inexperienced person to perform the duties of brakeman, and couple cars, without first giving him proper instructions.

" 22. That plaintiff is damaged by the pain, suffering and mental anguish endured, and the loss of his leg as aforesaid, in the sum of seven thousand dollars.

" 23. If, upon these facts, the law is with the plaintiff, we find for the plaintiff and assess his damages at seven thousand dollars. If the law is with the defendant, then we find for the defendant."

Upon the return of the verdict, and before the jury were discharged, appellant filed the following motion:

" The defendant asks the court to direct the jury to make more perfect their verdict in the following particulars:

" 1. That they make the second finding more perfect by finding whether the defendant had or had not notice of the plaintiff's minority, and of his mother's objection to his working on the railroad.

" 2. That the eighth finding be made more definite by finding the name and position of the defendant's agent who ordered the plaintiff to go to the rear end of the construction train and act as brakeman thereon.

" 3. That the tenth finding be made more perfect and definite by finding the name and position of the agent of the defendant

who ordered the plaintiff to couple cars to the construction train.

" 4. That the eleventh finding be made more perfect and definite by finding what care the plaintiff exercised in coupling said cars.

" 5. That the twelfth finding be made more perfect and definite by finding what care the plaintiff exercised in attempting to make said coupling.

" 6. That the fourteenth finding be made more perfect and definite by finding the name of the person, and the position he occupied in defendant's service, who ordered the plaintiff to make the coupling of certain cars standing on said switch to other cars attached to the locomotive of the train upon which the plaintiff was working, and that they find the position occupied by Andrew Mertens.

" 7. That the twentieth finding be made more perfect and definite by finding what the wrongful acts of the defendant were that caused the injury."

That motion having been overruled, appellant moved for a *venire de novo*. This motion was also overruled. We think that the court below clearly erred in overruling these motions.

The statute provides in relation to verdicts as follows: " The verdict of a jury is either general or special. A general verdict is that by which they pronounce generally upon all or any of the issues, either in favor of the plaintiff or defendant. A special verdict is that by which the jury find the facts only, leaving the judgment thereon to the court." R. S., 1881, § 545.

The purpose of a special verdict is to avoid the mistakes that the jury may make in the application of the law to the facts. When a special verdict is demanded, the jury are to find the facts, and the court declares the law upon those facts; and hence it is well settled that a special verdict should be limited to the case as made by the pleadings, should find all the facts proven under the issues, and should not embody or state conclusions of law. If a special verdict includes findings of evidence, conclusions of law and matters without the issues, such findings will be disregarded in the determination and rendition of the judgment. If stripped of these matters, the verdict is yet sufficient to lead up to and support a judgment either way under the issues as made by the pleadings, a motion for a *venire de novo* will be overruled. Pittsburgh, etc., R. R. Co. v. Spencer, 98 Ind. 186,

and cases there cited; Indianapolis, etc., R'y Co. v. Bush, 101 Ind. 582; Dixon *v.* Duke, 85 Ind. 434; Louisville, etc., R'y Co. v. Balch, 105 Ind. 93; Hasselman *v.* Carroll, 102 Ind. 153.

As appellee's mother is not prosecuting this action, we cannot see how it is of any importance whether appellee was employed by appellant with or without her consent. The third and fourth findings, therefore, may be disregarded.

In the eleventh and fourteenth findings, it is stated that appellee received the injury without fault or negligence on his part.

In the twelfth finding, it is stated that appellee exercised such care as might reasonably have been expected of him, considering his youth and inexperience.

The fifteenth finding is, that appellant was careless and negligent in allowing the sliver or splint to remain and protrude from the rail.

In the sixteenth finding, it is stated that appellant was guilty of negligence in running the train without brakemen.

The twentieth finding is, that the injury was caused by the wrongful act of appellant.

The twenty-first finding is, that it was negligence on the part of appellant to order an inexperienced person to perform the duties of brakeman and to couple cars, without first giving him proper instructions.

In each and all of these findings in relation to wrong and negligence on the part of appellant, the jury, instead of returning the facts and leaving it for the court to pronounce the law upon those facts, returned conclusions which embody conclusions of law. This they had no right to do, and hence all such conclusions must be disregarded; and hence there is nothing properly in the verdict showing that appellant was in any way guilty of wrong or negligence as connected with the defective rail, or that it was guilty of any other wrong or negligence to the injury of appellee, unless other portions of the verdict show wrong and negligence upon its part in ordering him from the work for which he was employed, to a different and more hazardous work. That is the question we shall hereafter consider.

Commencing with the decision of the English court in the case of *Priestley v. Fowler*, 3 M. & W. 1, in 1837 (1), the decision of

1. In *Priestley v. Fowler*, 3 Mees. & of a van, in which he and a fellow-W. 1, the defendant was sued by his servant were carrying goods for his servant, injured by the breaking down master, by reason of its weakness and

the Supreme Court of South Carolina in the case of *Murray v. R. R. Co.*, 1 McMullan, 385, in 1841, and the decision of the Supreme Court of Massachusetts in the case of *Farwell v. Boston, etc., R. R. Corp.*, 4 Met. 49, in 1842, it has become the settled law in England, Scotland and Ireland, and the States of this Union, with scarcely an exception, that, as a general rule, in the contract of hiring, there is an implied undertaking upon the part of the master that he will use all reasonable care to furnish safe premises, machinery, and appliances for conducting the business safely, and that he will use all reasonable care to furnish competent and prudent co-employees. The master, by the contract of hiring, does not become an insurer against injury to the servant. On the other hand, in the contract of hiring, there is an implied undertaking upon the part of the servant that he will exercise reasonable care to avoid injury, and that he assumes all ordinary risks incident to the business, and all risks from the negligence of his co-employees. When the master has kept and performed his implied undertaking, the servant cannot recover from him for injuries resulting from the business, or the negligence of such co-employees, however dangerous the business may be.

This general rule has been modified by statute in some of the States, but not in this State. The rule obtains, regardless of the fact that one employee may be the superior in rank to others in the same general undertaking or employment, unless he occupies the place of vice-principal. *Pierce R. R.* 358, and cases there cited; *Wood Master and Servant*, §§ 326, 416, 425, and cases there cited; *Madison, etc., R. R. Co. v. Bacon* 6 Ind. 205 (1); *Gormley v. Ohio, etc., R'y Co.*, 72 Ind. 31; *Lake Shore,*

excessive loading. Defendant was held not to be liable. The court said that the principal was under no implied obligation to his servant for the sufficiency of the van, as he had no more knowledge of its condition than the servant himself.

See also abstract of the case of *Priestley v. Fowler*, on page 371, *ante*.

1. In *MADISON & INDIANAPOLIS R. R. Co. v. BACON*, 6 Ind. 205 (May Term, 1855), it was held that a principal is not liable to one of his servants for injuries

sustained through the negligence of another servant, when both are engaged in the same business. The action was by the widow of a deceased employee and the complaint alleged that her husband was killed while traveling as a passenger in one of defendant's cars. Defendant's answer was that the deceased was not a passenger, but a servant of the company, and that the accident happened through the negligence of his fellow-servant. The answer was held to be sufficient. It was also held that § 3, p. 426, 1 R. S., 1852,

etc., R'y Co. *v.* McCormick, 74 Ind. 440; Robertson *v.* Terre Haute, etc., R. R. Co., 78 Ind. 77; Umback *v.* Lake Shore, etc., R'y Co., 83 Ind. 191; Louisville, etc., R. R. Co. *v.* Orr, 84 Ind. 50, 14 Am. Neg. Cas. 484, *ante*; Brazil, etc., Coal Co. *v.* Cain, 98 Ind. 282, 14 Am. Neg. Cas. 480, *ante*; Indiana Car Co. *v.* Parker, 100 Ind. 181, 14 Am. Neg. Cas. 422, *ante*; Atlas Engine Works *v.* Randall, 100 Ind. 293, 14 Am. Neg. Cas. 438, *ante*; Indianapolis, etc., R'y Co. *v.* Johnson, 102 Ind. 352; Capper *v.* Louisville, etc., R'y Co., 103 Ind. 305.

The above general rule applies to minors. Pierce R. R. 360, and cases there cited; Wood Master and Servant, § 368, p. 744, and cases there cited; Thompson Neg. 977, and cases there cited; Ohio, etc., R. R. Co. *v.* Hammersley, 28 Ind. 371; Sullivan *v.* Toledo, etc., R'y Co., 58 Ind. 26; Ohio, etc., R. R. Co. *v.* Tindall, 13 Ind. 366; Atlas Engine Works *v.* Randall, *supra*; Brazil, etc., Coal Co. *v.* Cain, *supra*. Out of this general rule has come the more specific one, that if the servant claims damages from the master for injuries received on account of defective premises, buildings, machinery or appliances, he must allege and prove that the unfitness or the defect, which caused the injury, was known to the master, or was such as, with reasonable diligence and attention to his business, he ought to have known. If the case before us is to rest alone upon the alleged negligence of appellant as connected with the alleged defective rail, then it must be shown that the rail was so defective when put in place by appellant, or, if it afterwards became worn and defective, that appellant knew of the defective and dangerous condition, or that it was defective and dangerous for such a length of time that appellant might and ought to have known of it by the exercise of reasonable attention, care and diligence. Thompson Neg., p. 971; Wood Master and Servant, §§ 368, 414, and cases there

which gave to the wife, or in case there was no wife, then to the minor children of a person killed by the negligence or unskillfulness of the officers or servants of a railroad company, etc., a right of action against the company, was repealed by implication by § 784, p. 205, 2 R. S., 1852. Judgment for plaintiff in the Marion Circuit Court for \$3,000 was reversed.

A similar ruling in an action brought under the statute referred to in the Ba-

con case, *supra*, was rendered in PERU & INDIANAPOLIS R. R. Co. *v.* BRADSHAW, 6 Ind. 146 (1855), where judgment for plaintiff in action for the negligent killing of her husband was reversed.

On the fellow-servant ruling in the Bacon case, *supra*, the court in that case said that the broad general ruling was left undecided in GILLENTWATER *v.* MADISON & INDIANAPOLIS R. R. Co., 5 Ind. 339 (9 Am. Neg. Cas. 290).

cited; Atchison, etc., R. R. Co. *v.* Wagner, 33 Kan. 660; Schooner "Norway" *v.* Jensen, 52 Ill. 373, 14 Am. Neg. Cas. 327, *ante*; Indianapolis, etc., R. R. Co. *v.* Love, 10 Ind. 554.

If the jury had found as a matter of fact, that appellant put down a defective and dangerous rail, or that it had actual knowledge of the defective rail, or had found and stated the length of time that it had been defective, and such other facts, if any, as surrounded the case, their verdict would have been a verdict of facts, and the court might then have declared upon the facts, as a matter of law, that appellant was or was not guilty of negligence as connected with the rail. No such facts are stated in the special verdict, and hence there is nothing in that verdict to show that appellant was guilty of negligence in allowing the alleged defective rail to remain in use upon the roadbed. It is apparent that the jury meant to find that appellant was thus guilty of negligence, but they returned legal conclusions instead of facts. The verdict is, therefore, defective upon its face, and so defective that judgment cannot be rendered upon it, if, as stated, the case is to rest alone upon the alleged negligence of appellant in allowing the defective rail to remain in use.

Appellee contends, however, that when injured he was not engaged in the work for which he was hired; that he was a minor, without experience in braking, operating trains and coupling cars; that he was wrongfully taken from the work for which he was engaged, and ordered by appellant to a more hazardous work, and that, therefore, the above general rule does not obtain, and that appellant is liable regardless of the fact as to whether or not it knew, or with reasonable care might have known, of the defective rail.

The above general rule is not without its exceptions, modifications and limitations.

The servant's implied assumption of risks is confined to the particular work and class of work for which he is employed. There is no implied undertaking, except as it accompanies and is a part of the contract of hiring between the parties. When the servant voluntarily, and without directions from the master, and without his acquiescence, goes into a hazardous work outside of his contract of hiring, he puts himself beyond the protection of the master's implied undertaking, and if he is injured he must suffer the consequences. On the other hand, if the servant, by the orders of the master, is carried beyond the contract of

hiring, he is carried away from his implied undertaking as to risks. If the master orders him to work temporarily in another department of the general business, where the work is of such a different nature and character that it cannot be said to be within the scope of the employment, and where he is associated with a different class of employees, he will not, by obeying such orders, necessarily thereby assume the risks incident to the work and the risks of negligence on the part of such employees. He will not necessarily be guilty of negligence in obeying such orders of the master, even though they may carry him into more hazardous and dangerous work. Whether or not the servant may be negligent in obeying such orders, will depend upon the facts and circumstances of each particular case. The facts and circumstances may be such as to show that in obeying such orders the servant voluntarily assumed the increased risks; or they may be such as to show that he obeyed the orders for a temporary change, under threats of discharge, or under such circumstances as that he might well have expected a discharge if he disobeyed.

In all cases the master is bound to disclose to the servant latent defects and dangers of which he has knowledge, or of which he ought to have knowledge by the exercise of reasonable attention, care and diligence, and of which the servant has no knowledge, and would not discover by the exercise of reasonable care. This is particularly so when the master employs, for a hazardous and dangerous work, a child, young person, or other person without experience, and of immature judgment. In such a case, the master is bound to point out the dangers of which he has, or ought to have, knowledge, and give to the employee such instructions as will enable him to avoid injury by the exercise of reasonable care, unless both the danger and the means of avoiding it are apparent, and within the comprehension of the servant. A neglect of such duties may, in a proper case, the servant being without contributory negligence, render the master liable, regardless of the fact that he may have exercised reasonable care in making and keeping the premises, machinery and appliances in a safe condition. The person employed may be so young, inexperienced and immature in judgment, that no kind of warning and instruction would relieve the master from responsibility for injuries resulting from putting him at a hazardous and dangerous work.

In the cases last above mentioned, the gravamen of the action is the negligence of the master in failing to give the proper warnings and instructions, and in employing a person of such immature years and judgment that such warnings and instructions would afford no protection. And hence, in order that the master may be properly charged as being thus negligent, and made liable for resulting injury, it must be made to appear that he knew, or by the exercise of reasonable care and observation might have known, of the inexperience, disqualification and immature judgment of the servant employed. When a person of apparently sufficient age, physical ability and mental caliber to perform the service, seeks an employment at the hands of a railway company, or other master, he ought to be held to an implied representation that he is competent to perform the duties of the position he seeks, and competent to apprehend and avoid all dangers that may be discovered by the exercise of ordinary care and prudence. In such a case, we know of no good reason or rule of law that will compel the master to pass him through a critical examination to discover his competency for the place, or that will convict the master of negligence for not so doing.

As we have said, when, by the order of the master, the servant is carried beyond his employment, he is carried away from his implied undertaking to assume the risks incident to the employment. Hence it is, that when a servant is thus, by orders of the master, put at work outside of his employment, and is injured by reason of defective machinery, railroad track, etc., without his fault, the master is liable, regardless of the care he may have exercised to keep the machinery, railroad track, etc., in a safe condition. When a servant is thus ordered to work at a particular place, or with particular machinery, etc., outside of his employment, the master impliedly assures him, not only that he has exercised reasonable care to have the place, machinery, etc., in a safe condition, but also that they are in a safe condition and fit for the business for which they are used. This principle, or rule of the law, has been more frequently and more rigorously applied in cases of employees immature in years, judgment and experience.

Here again it should be observed that the master will not be thus liable, if the circumstances are such as to show that the servant is competent to apprehend the danger, and expressly or impliedly assumes the risk. The following authorities fully

support the above ruling: *Atlas Engine Works v. Randall, supra*; *Hill v. Gust*, 55 Ind. 45, 14 Am. Neg. Cas. 447, *ante*; *Hawkins v. Johnson*, 105 Ind. 29, 14 Am. Neg. Cas. 444, *ante*; *Indiana Car Co. v. Parker, supra*; *Mann v. Oriental Print Works*, 11 R. I. 152, and Judge Redfield's note thereto, 14 Am. L. Reg. N. S. 728; *R. R. Co. v. Fort*, 17 Wall. 553; *Lalor v. Chicago, etc., R. R. Co.*, 52 Ill. 401; *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572; *Chicago, etc., R'y Co. v. Bayfield*, 37 Mich. 205; *Dowling v. Allen & Co.*, 74 Mo. 13; *Wood Master and Servant*, §§ 349, 350, 352, 439; *Beach Con. Neg.*, § 132; *Thompson Neg.*, pp. 975, 976, § 7; p. 977, § 8; p. 979, § 9; p. 1016, § 21; *Pierce R. R.* 378.

Thus far we have spoken of orders given to the servant by the master. In most of the cases without this State, above cited, the orders were by persons held to have sustained to the master the relation of vice-principal. We cite those cases in support of the general doctrines here declared. So far as they hold that any particular person, upon any particular evidence, may be regarded as a vice-principal, we express no opinion, either of approval or disapproval at this time. We are not required at this time to decide anything upon those questions, because they are not properly before us.

We turn again to the special verdict. It is very clear that this verdict does not bring appellee's case within the doctrine for which he contends, and the doctrine here declared.

It is stated in the fifth special finding that appellee was ordered by appellant's section boss, having charge of a certain section of the road, to go upon a construction train, but it is not shown that this section boss had any authority at all over appellee, or that he was the boss of the section upon which he was employed to work.

It is stated in the eighth special finding that appellee was ordered by appellant's "agent and plaintiff's superior in authority" to go to the rear of the construction train and act as brakeman.

In the tenth special finding, it is stated that "appellee was ordered by an agent of defendant, and a superior in authority to plaintiff," to couple some cars to the construction train.

In the fourteenth special finding it is stated that appellee was ordered by "an employee of defendant, and superior to plaintiff in authority on said railway, to make the coupling of certain cars

attached to the locomotive of the train on which he was working," and that the " defendant ordered him to couple cars."

We think that the jury should have been returned to their room with instructions to make each and every one of these findings in relation to the persons who gave the orders, more certain and specific, so as to show the nature of their employment, their duties and authority generally, and what control, if any, they were given and had over appellee as a servant of the common master. Whether the purpose of these findings was to show that appellee did not voluntarily leave the work for which he was employed, and voluntarily undertake a more hazardous work, or that appellant was guilty of wrong in thus ordering him to do the hazardous work outside of his employment, or is in any way liable by reason of such orders, it is equally important and essential that the persons who gave the orders should have had authority to bind appellant by such orders. In other words, the orders must have been the orders of the master, appellant. And in order that they should be so, the persons giving the orders must, as to such orders, have occupied the position of vice-principal.

If appellee, without any kind of orders by appellant and as a mere volunteer, left the work for which he was employed, and as such volunteer undertook the coupling of cars, he cannot hold appellant liable on account of any injuries he may have thus received. And if upon the orders of a co-employee, engaged in the same work with him, and without authority from the master to order and control appellee's work and movements, he left his work and engaged in the hazardous work, he cannot make the master respond in damages for the consequences. *Wood Master and Servant*, §§ 425, 450, 451 (p. 889); *Thompson Neg.*, pp. 1016-17; *Felch v. Allen*, 98 Mass. 572; *Brown v. Byroads*, 47 Ind. 435; *Everhart v. Terre Haute*, etc., R. R. Co 78 Ind. 292 (1).

It does not necessarily follow that because the persons giving the orders stood towards appellee in the relation of superior in the employ of appellant, they had authority, or the semblance of authority, to order him to do the braking and coupling. They may have been superior in rank, and yet without authority, or the semblance of authority, to give such orders. For the reasons

i. The Indiana cases relating to the Indiana cases in this volume of master and servant cited in the opinion *AM. NEG. CAS.* in the case at bar, are reported with

stated, also, the court should have sustained appellant's motion for a rule to make the complaint more certain and specific.

If it be said that the special findings last above under consideration amount to statements that the persons giving the orders to appellee occupied the position of vice-principals, then we should have those findings in collision with the rule that the jury, in returning a special verdict, cannot embody therein conclusions of law. Whether or not such persons had such authority, or occupied the position of vice-principals, would depend upon their rank in the master's service, their duties and powers, their relation to appellee, and the authority expressly conferred upon them by the master, etc. These are matters of fact.

The jury should have found and returned the facts. Upon the facts so found it would have been for the court to declare, as a matter of law, whether or not the persons giving the orders were, as to such orders, vice-principals. Rejecting what may be regarded as conclusions of law, the special verdict states nothing to show that appellee left his work and went upon the train by the orders of any one who had authority to direct him and bind appellant by such directions. Here, again, the jury attempted to find that appellee went upon the train under proper orders, but rendered their verdict defective by returning legal conclusions, and not the facts.

The seventeenth finding is, that the supervisor, who had charge of a portion of the road, was upon the train in charge of the hands thereon, and directed that appellee be ordered to the rear of the car to act as brakeman and couple cars. Of this finding it is sufficient to say that there is nothing in the verdict to show that this direction was carried out by any one, or that appellee acted in obedience to it.

Whether the case should be made to rest upon the alleged negligence of appellant, as connected with the defective rail, or upon its alleged wrong or negligence in ordering appellee from the work for which he was employed to the different and more dangerous work of coupling cars, it must appear that he was not guilty of negligence which contributed to his injury. In no case will the master be held, as upon a warranty, against the negligence of the servant, who thereby brings injury upon himself which he might have avoided by the exercise of reasonable care and prudence. If appellee knew of the defective rail, and under all the circumstances, by the exercise of reasonable care, might

have avoided the injury, he cannot recover. It is not found in the special verdict that he did not know of the defective and dangerous rail, nor that the circumstances were such that he did not comprehend the danger. It is found that he had never performed the duties of brakeman, nor coupled cars, and that he had no experience in railroading except working upon the track; but that might all be, and yet he might have known that to undertake to couple the cars over it, in the manner he did, was dangerous, and would result in injury. The other portions of the verdict, so far as they relate to care on appellee's part, are mere conclusions of law, and must be disregarded.

The judgment is reversed, with costs, and the cause remanded, with instructions to the court below to sustain appellant's motion for a *venire de novo*, and his motion for a rule upon appellee to make his complaint more certain and specific.

#### MINOR EMPLOYEES INJURED WHILE IN THE SERVICE OF RAILROAD COMPANIES.

1. Brakemen injured.
  - a. Coupling cars.
  - b. Thrown from cars.
2. Construction train — Derailment of.
3. Construction train — Thrown from.
4. Defective car and appliances.
5. Explosion — Cleaning engine.
6. Falling from freight car.
7. Falling object — Tunnel.
8. Injured while assisting employee.

#### 1. Brakemen injured.

##### a. Coupling cars.

In *St. Louis & S. E. R'y Co. v. VALIRIUS*, 56 Ind. 511 (May Term, 1877), minor employee, sixteen years of age, employed as brakeman, switchman and car-coupler upon defendant's railway, fatally injured by being caught between the cars, which were alleged to be defectively constructed, judgment for plaintiff, mother of the deceased, for \$1,200 in the Vanderburgh Circuit Court was affirmed. The Valirius case ruling on the question of railroad companies adopting improved machinery was criticised in *Lake Shore, etc., R'y Co. v. McCormick*, 74 Ind. 440, where it was held that railroad companies were bound only to ordinary care in keeping machinery in good repair. The McCormick case ruling was approved in *Umback v. Lake Shore, etc., R'y Co.*, 83 Ind. 191, and the Valirius case ruling was criticised.

In *UMBACK v. LAKE SHORE & MICHIGAN SOUTHERN R'Y CO.*, 83 Ind. 191 (May Term, 1882), minor employee, nineteen years of age, a switchman in defendant's employ, injured while coupling cars, judgment for defendant in the Laporte Circuit Court was affirmed, the plaintiff having assumed the risks. The ruling as to duty to keep machinery in repair, etc., declared in *Lake Shore, etc., R'y*

**Co. v. McCormick**, 74 Ind. 440, approved, and the ruling in **St. Louis, etc., R'y Co. v. Valirius**, 56 Ind. 511, criticised.

In **PENNSYLVANIA Co. v. LONG**, 94 Ind. 251 (November Term, 1883), minor employee, seventeen years old, killed by being caught between cars while attempting to couple same, judgment for plaintiff, the mother of the deceased, was *reversed*, for erroneous instruction on the question of service of minor without parent's consent. Petition for rehearing overruled.

In **LOUISVILLE, NEW ALBANY & CHICAGO R'Y Co. v. FRAWLEY**, 110 Ind. 18 (November Term, 1886), minor employee, a brakeman, injured while attempting to couple engine and freight car, his hands being caught and crushed between the deadwoods, judgment for plaintiff for \$7,700 in the Tippecanoe Circuit Court was *affirmed*. The questions of assumption of risk and duty to instruct minor employees as to extra hazards fully discussed.

**CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS R'Y Co. v. SLOAN**, 11 Ind. App. 401 (November Term, 1894); minor employee, a brakeman, fatally injured, while between cars for the purpose of coupling the same, by reason of a defective track; judgment for plaintiff in the Benton Circuit Court *reversed*; erroneous admission of declarations of decedent ten minutes after injury as part of *res gestae*.

*b. Thrown from cars.*

In **PENNSYLVANIA Co. v. CONGDON (BY NEXT FRIEND)**, 134 Ind. 226 (November Term, 1892), minor employee, eighteen years of age, acting as brakeman on freight train, injured, by being thrown forward and between car and tender of said engine which was suddenly slowed by the engineer without warning or signal, run over and arm crushed, defective lantern being alleged as cause of injury, judgment for plaintiff in the Allen Circuit Court was *reversed* on the ground that the complaint did not sufficiently show cause of action.

In **O'NEAL v. CHICAGO & INDIANA COAL R'Y Co.**, 132 Ind. 110 (June, 1892), brakeman, twenty years of age, injured by being thrown from train as same was being backed on side track, the accident being caused by alleged defective condition of the track, judgment for the railway company in the Clay Circuit Court was *affirmed*. It was held that plaintiff was not free from contributory negligence; that the condition of the track was open and obvious, the presumption being that plaintiff had notice thereof and assumed the risks; that while the master is bound to provide a safe working place for his servants he is not an insurer; that plaintiff's age did not bring him within the rule that children must be warned of the dangers of the service and properly instructed as to the duties required of them.

**2. Construction train — Derailment of.**

In **EVANSVILLE & RICHMOND R. R. Co. v. HENDERSON**, 134 Ind. 636 (May Term, 1893), minor employee, nineteen years old, riding on construction train over half-finished track, injured by derailment of train, defective track being alleged, judgment for plaintiff in the Jackson Circuit Court was *reversed* on the ground of assumption of risk, etc.

A subsequent decision in the **HENDERSON** case resulted in judgment for plaintiff being *reversed* on similar grounds of former appeal. See 142 Ind. 596 (November Term, 1895).

In **OHIO & MISSISSIPPI R'Y Co. v. TINDALL**, 13 Ind. 366 (November Term, 1859), minor employee, eighteen years of age, working with other employees

graveling a portion of the railroad track, killed by the carelessness of the engineer in running the gravel train whereby it collided with an animal and was thrown off the track, judgment for plaintiff, the mother of the deceased, for \$2,000 in the Martin Circuit Court was *reversed* on the fellow-servant rule, and for error in charge on damages. The rulings in *Madison & Ind. R. R. Co. v. Bacon*, 6 Ind. 205, and *Fitzpatrick v. New Albany, etc.*, R. R. Co., 7 Ind. 436, affirmed.

### 3. Construction train — Thrown from.

In *EVANSVILLE & RICHMOND R. R. CO. v. MADDUX (BY NEXT FRIEND)*, 134 Ind. 571 (May Term, 1893), minor employee, riding on construction train, thrown from car and construction materials falling on him injuring his leg, the accident being caused by defective roadbed, judgment for plaintiff in the Lawrence Circuit Court was *affirmed* and petition for rehearing overruled.

In *CHICAGO & GREAT EASTERN R'Y CO. v. HARNEY*, 28 Ind. 28 (May Term, 1867), minor employee, eighteen years of age, employed as track hand, ordered by defendant's roadmaster to assist in loading and distributing railroad ties from a construction train, thrown from train by reason of one of the ties striking a post near track and the end of such tie striking the employee, it was held that where an employee is hired to do a particular work and an employee orders him to do something more hazardous and he is injured thereby, the railroad company is liable for the injury. In such case it was also held that the father could not maintain an action for injury to his minor son, unless the railroad company was negligent in hiring the fellow-servant causing the injury, and for error in refusing an instruction requested to this effect, judgment for plaintiff in the Howard Common Pleas was *reversed*.

See also *OHIO & MISSISSIPPI R. R. CO. v. HAMMERSLEY*, 28 Ind. 371 (November Term, 1867) for rulings similar to the HARNEY case, *supra*. The HARNEY case was an action by a father for damages for death of minor son while riding on the engine of a construction train in violation of rules, his duties being simply to furnish water to employees on the train. The railroad company was held not to be liable, and judgment for plaintiff was *reversed*.

### 4. Defective car and appliances.

*CHICAGO & ERIE R. R. CO. v. BRANYAN, ADM'R*, 10 Ind. App. 570 (May Term, 1894); minor employee, nineteen years old, foreman of derrick car used in making repairs on defendant's road, fatally injured by the breaking of the car, caused by defective appliances, etc., whereby he was caught in the wreckage; judgment for plaintiff for \$3,000 in the Huntington Circuit Court was *affirmed* and petition for rehearing overruled.

### 5. Explosion — Cleaning engine.

*LOUISVILLE, EVANSVILLE & ST. LOUIS R. R. CO. v. BERRY*, 2 Ind. App. 427 (May Term, 1891); minor employee, eighteen years old, employed as an "engine washer," ordered by foreman of engine-house to go under an engine to tighten mud plugs in the rim of the boiler, fatally injured by being burned and scalded with escaping steam and hot water caused by one of the plugs being blown out by the pressure in the boiler; judgment for plaintiff in the Dubois Circuit Court for \$900 *reversed* for erroneous rejection of competent and material evidence bearing upon the declarations of the injured party at the time of the accident.

**6. Falling from freight car.**

TOLEDO, ST. LOUIS & KANSAS CITY R. R. CO. v. TRIMBLE, 8 Ind. App. 333 (November Term, 1893); minor employee, nineteen years of age, a nightwatchman in defendant's service, fatally injured by being thrown from top of freight car, owing to sudden stop of train; judgment for plaintiff *reversed*, it not being shown that alleged incompetency of engineer was known to defendant.

**7. Falling object — Tunnel.**

LOUISVILLE, NEW ALBANY & CHICAGO R'Y CO. v. CORNELIUS, 14 Ind. App. 399 (November Term, 1895); minor employee, one of a gang of laborers employed at work in a tunnel, injured by the fall of a large quantity of rock and dirt from roof of tunnel; judgment for plaintiff *affirmed*.

**8. Injured while assisting employee.**

In COOPER (BY NEXT FRIEND) v. LAKE ERIE & WESTERN R. R. CO., 136 Ind. 366 (January, 1894), an action against a railroad company for damages, the syllabus to the official report states "the complaint shows that the plaintiff, a young man under twenty-one years of age, boarded a freight train, under arrangements with the conductor and brakeman, that he should assist the brakeman, so far as he could, in consideration of being permitted to ride from P. to M., and that while so assisting the brakeman, being ignorant of the dangers of the service, and without instructions, plaintiff was severely injured by the carelessness of defendant's servants; failing to show any authority in the conductor or brakeman to employ assistance, or that there was an emergency therefor, and failing to show a custom, rule or regulation of the company, by which plaintiff might pay his way by working on the train, whereby he might be a passenger. Held, that the complaint is insufficient." Plaintiff was thrown from top of car by another car colliding with the car on which he was standing. Judgment for defendant in the Wells Circuit Court *affirmed*.

## LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY v. STUPAK.

*Supreme Court of Judicature, Indiana, May Term, 1886.*

[Reported in 108 Ind. 1.]

**FELLOW-SERVANT.** — A master is not liable in damages to an employee for an injury caused or occasioned by the negligence, whether of omission or commission, of a co-employee or fellow-servant.

**PLEADING — COMPLAINT — INCOMPETENT FELLOW-SERVANT.** — Where a servant shows in his complaint that the injury for which he sues the master was caused or occasioned by the negligence of his fellow-servant, he must also allege, either that the master had not exercised ordinary care in the employment of such fellow-servant, or that he had retained him in his service after notice of such servant's negligent discharge of his duties, and the injured servant must also aver that he had no knowledge, at the time he entered the master's service, of the negligent habits of such fellow-servant, and the failure to so aver is not cured by the allegation that he

was "wholly unacquainted" with such fellow-servant at the time of entering the master's service.

**INCOMPETENT SERVANT — KNOWLEDGE OF INJURED SERVANT — CONTINUANCE IN SERVICE — PLEADING — COMPLAINT.** — Where a servant remains in the master's service after he has knowledge of the negligent habits of a fellow-servant, he must show in his complaint for injuries caused by the negligence of such fellow-servant, a reasonable excuse for remaining in the service after acquiring such knowledge of the negligence of his fellow-servant (1).

*So held*, in action for damages for injuries sustained by plaintiff, a track laborer in defendant's employ, caused by negligent act of a fellow-servant in suddenly starting a work train without warning, whereby plaintiff was thrown between the cars and seriously injured.

FROM the Porter Circuit Court. The case is stated in the opinion. *Judgment reversed.*

J. I. BEST, A. POND, O. G. GETZEN-DANNER, J. MORRIS, C. H. ALDRICH and J. M. BARRETT, for appellant.

A. H. BARTHOLOMEW, E. D. CRUMPACKER, A. C. HARRIS and W. H. CALKINS, for appellee.

**Hawk, Ch. J.** — The first error of which complaint is here made by appellant, the defendant below, is the overruling of its demurrer to the first paragraph of appellee's complaint.

In the first paragraph, appellee alleged that appellant was a railroad corporation owning and operating a railroad over and across Porter county, Indiana; that, in the operation of its railroad, appellant ran a certain locomotive engine and construction train, composed of flat cars, used for hauling gravel, etc., westward from Laporte, Indiana; that such locomotive and train of cars had been so used by appellant for five years before the commencement of this suit; that, on such train of cars, appellant had in its employ a large number of hands who resided at different

1. On a subsequent trial plaintiff again recovered a verdict and judgment which, however, on appeal by defendant, was *reversed*, and petition for rehearing overruled. See *LAKE SHORE & MICHIGAN SOUTHERN R'Y CO. v. STUPAK*, 123 Ind. 210 (November Term, 1889).

In *LAKE SHORE & MICHIGAN SOUTHERN R'Y CO. v. STUPAK*, 123 Ind. 210, it was *held* that where "the material charge in a complaint was that defendant, with notice of the negligence and carelessness of its engineer, carelessly and negligently retained him in its ser-

vice, it will be presumed, in the absence of a finding by the jury of the existence of this fact, that it was not proven on the trial. A finding that defendant had knowledge of the careless habits of its engineer before the day on which the injury occurred, does not authorize it to be said, as matter of law, that defendant negligently retained him in its service after such knowledge." Nothing can be added to a special verdict by inference. It was also *held* in the STUPAK case that the engineer and plaintiff were fellow-servants.

points along its railroad, and were conveyed by such train to and from their places of labor, night and morning; that appellant had in its employ, for a year prior to the 13th day of August, as engineer of the locomotive engine used to propel such construction train, one Pool, who was habitually careless and negligent in the discharge of his duties as such engineer, during all of said time, and was not possessed of sufficient skill to run said engine in an ordinary careful and prudent manner, of all which appellant had due notice but negligently retained said Pool in its employ as such engineer.

Appellee further alleged that some time during July, 1883, he being wholly unacquainted with said Pool, and with appellant's employees in charge of such construction train, entered the service of appellant as one of its laborers or work-hands upon such construction train, and as a track repairer of its roadbed; that on or about such 13th day of August, 1883, the appellee, while in appellant's employ, upon such construction train, was standing upon one of the cars of such train, while the same was standing still, and while the locomotive engine attached thereto was in the management and control of said Pool, when, without any fault or negligence upon appellee's part, said Pool negligently and without any signal or warning suddenly put said engine and train of cars in rapid motion, whereby appellee was thrown off his feet, between two cars, and his arms were crushed and broken in such a manner as to be permanently disabled, and his person was otherwise mangled, cut and bruised, causing him great physical and mental suffering, etc., to his damage, etc. All of which was wholly without his fault, but owing to the fault and negligence of said Pool as aforesaid, and of the appellant in keeping said Pool in its employ, as such engineer, after notice of his unskilful and negligent habits in running said engine as aforesaid. Wherefore, etc.

It is claimed by appellant's counsel that this paragraph of complaint was insufficient, and the demurrer thereto ought to have been sustained, for two reasons, namely: 1. Because appellee has not averred therein that he did not know of Pool's negligent habits at the time he entered appellant's service.

2. Because appellee has failed to aver any excuse for his remaining in appellant's service after he knew, or should have known, of Pool's negligent habits.

The general rule of law, recognized and acted upon in many

of our decisions, is, that the master is not liable in damages to an employee for an injury caused or occasioned by the negligence, whether of omission or commission, of a co-employee or fellow-servant. The liability to injury, resulting from the negligence of his co-employees, is one of the risks which each employee, engaging with others in the service of a common master, takes upon himself. Such a liability to injury is a hazard incident to the nature of the service into which the employee enters, and against which the master is not an insurer, in the absence of an express contract to that effect. Nor is the master rendered liable by the fact, if it be the fact, that the injured employee is inferior in grade of employment to the co-employee, through whose negligence the injury is caused, if both were employed in the same general business; or, in other words, "if the services of each in his particular sphere or department are directed to the accomplishment of the same general end." Columbus, etc., R'y Co. v. Arnold, 31 Ind. 174 (1); Pittsburgh, etc., R'y Co. v. Ruby, 38 Ind. 294, 14 Am. Neg. Cas. 503, *ante*; Brazil, etc., Coal Co. v. Cain, 98 Ind. 282, 14 Am. Neg. Cas. 408, *ante*; Pittsburgh, etc., R'y Co. v. Adams, 105 Ind. 151, 14 Am. Neg. Cas. 523, *ante*.

Where, therefore, as here, the servant shows in his complaint that the injury, for which he sues the master, was caused or occasioned by the negligence of his fellow-servant, he must also allege in his complaint, either that the master had not exercised ordinary care and prudence in the employment of such fellow-servant, or that it had retained him in its service, after it had

i. In COLUMBUS & INDIANAPOLIS CENTRAL R'y Co. v. ARNOLD, ADM'R, 31 Ind. 174 (May Term, 1869), fireman fatally injured by explosion of defective boiler to engine, judgment for plaintiff for \$2,500 in the Marion Common Pleas was reversed for errors in giving and refusing to give several instructions. The cases of GILLENTWATER v. MADISON & IND. R. R. Co., 5 Ind. 339, 9 Am. Neg. Cas. 290<sup>a</sup>, and FITZPATRICK v. NEW ALBANY & S. R. R. Co., 7 Ind. 436, were *disapproved* on the question of liability of master for negligent conduct of an employee resulting in injury to another employee. The fellow-servant rule and the duties and liabilities

of master and servant are very fully discussed in the ARNOLD case by ELLIOTT, Ch. J.

In FITZPATRICK v. NEW ALBANY & SALEM R. R. Co., 7 Ind. 436 (May Term, 1856), it appeared that "the plaintiff was employed by a railroad company, with other laborers, to ballast a part of their road, by excavating gravel from certain banks, loading it in the company's gravel cars, and afterwards unloading and distributing it upon the railroad. The plaintiff, and others of the laborers, boarded and lodged in the town of C., two miles from the gravel banks, and, by agreement with the company, were regularly to be conveyed to town to

received notice that he was negligent in the discharge of the duties of his position. This much must be stated, in relation to the negligence of the master; and with respect to himself, in such a case, the injured servant must aver in his complaint that, at the time he entered the master's service, he had no knowledge of the negligent habits of the fellow-servant, through whose negligence he has alleged that he was injured. It is for the want of this last averment, or its equivalent, that the first paragraph of appellee's complaint in the case at bar was fatally insufficient. If the appellee knew, at the time he entered appellant's service (and we cannot presume that he did not know, in the absence of any averment to that effect), that his fellow-servant, Pool, was habitually negligent in the discharge of his duties as an engineer, and was not possessed of sufficient skill to run an engine in an ordinarily prudent manner, it must be held, we think, that he voluntarily took upon himself all the risks incident to, or growing out of, Pool's negligence and lack of skill in the management of his engine. Appellee has sued the appellant to recover damages for an injury, alleged by him to have been caused by the negligence of Pool, his fellow-servant. To have stated a cause of action sufficient to withstand a demurrer for the want of facts, in such a case, it was necessary that the appellee should have alleged in his complaint, not alone that appellant knew of Pool's negligence, but also that he had no knowledge thereof; for, if he had knowledge of Pool's negligent habits and entered appellant's service with such knowledge, he thereby consented to serve with Pool in the way and manner in which Pool conducted appellant's

their meals, etc., and back again to the gravel banks. While the plaintiff was being conveyed, during the period of his service, on a gravel car to the banks to work, by the gross negligence and unskillfulness of the engineer employed in managing and running the locomotive drawing the car, the locomotive ran into and came in collision with a train of passenger cars belonging to the company, by means whereof the plaintiff's leg was broken and he was otherwise injured. Held, that the company was liable to the plaintiff for the injury."

In the FITZPATRICK case, *supra*, it was

held that "a railroad company is liable to a servant for an injury occasioned by the negligence of other servants of the company, where the duties of the latter, in connection with which the injury happened, were not common, nor in the same department with those of the injured servant, and where the negligence of the injured servant did not contribute to produce the injury."

See also LAWRENCEBURGH & UPPER MISSISSIPPI R. R. Co. v. MONTGOMERY, 7 Ind. 474 (9 Am. Neg. Cas. 279%), a passenger case; person riding on gravel train injured in collision, where judgment for plaintiff was affirmed.

business; and having so consented, he can have no sufficient grounds of complaint against appellant for an injury, caused by or resulting from Pool's negligent habits. *Sullivan v. India Mfg. Co.*, 113 Mass. 396; *Gibson v. Erie R'y Co.*, 63 N. Y. 449; *De Forest v. Jewett*, 88 N. Y. 264; *Wonder v. Baltimore, etc., R. R. Co.*, 32 Md. 411; *Mich. Cent. R. R. Co. v. Smithson*, 45 Mich. 212; *Hughes v. Winona, etc., R. R. Co.*, 27 Minn. 137; *Riest v. City of Goshen*, 42 Ind. 339; *Green, etc., Passenger R'y Co. v. Bresmer*, 97 Pa. St. 103; *McGinnis v. Canada Southern Bridge Co.*, 8 Am. & Eng. R. R. Cases, 135, note p. 139; *Wood Mast. & Serv.*, § 423, note.

The appellee alleged in the first paragraph of his complaint, on the point under consideration that he was "wholly unacquainted with said Pool." This averment by no means supplies or meets the objection, urged by appellant's counsel, to the sufficiency of the first paragraph of appellee's complaint. The fact that appellee was wholly unacquainted with Pool does not show, nor tend to show, that he was not fully informed of Pool's negligent habits and lack of skill as an engineer at the time he entered appellant's service as Pool's fellow-servant. We are of opinion, therefore, that appellant's first objection to the sufficiency of the first paragraph of appellee's complaint is well taken and must be sustained.

Appellant's counsel also insist in argument that the first paragraph of complaint was bad on the demurrer thereto, because appellee failed to allege therein any excuse for his remaining in appellant's service after he knew, or should have known, of Pool's negligent habits. Appellee alleged that "some time during July, 1883," he entered appellant's service as a laborer and track repairer, and continued in such service until the 13th day of August, 1883, on which day he was injured. As against the appellee, this averment may be fairly construed to mean that on the 1st day of July, 1883, he entered appellant's service, etc., and continued in such service for the six weeks thence next ensuing until the day on which he was injured. During all of such six weeks he worked on the construction train, whereof Pool was engineer in charge and conveyed appellee by such train to and from his place of labor, night and morning. If, as alleged, "Pool was habitually careless and negligent in the discharge of his duties as such engineer, during all of said time, and was not possessed of sufficient skill to run said engine in an ordinary

careful and prudent manner," it cannot be doubted that appellee knew, or ought to have known, of Pool's negligent habits long before the day on which he was injured. Of such a case, in Wood on Master and Servant, § 422, it is said: "So, too, when a co-servant is injured through the incompetency of a fellow-servant, and he knows or has the same means of knowing of such incompetency as the master has, he cannot recover for injuries resulting to him from such servant's negligent acts, because he is chargeable with negligence in not informing the master, if he knew the fact, or if he did not, is equally as chargeable with negligence as the master, for not knowing it; and if he did know of it, and with such knowledge remained in the service, he is treated as assuming all the risks incident to such incompetency or unskilfulness, unless he establishes a reasonable excuse for remaining." The text of the learned author is fully supported by the decided cases, cited in the foot-notes. *Davis v. Detroit, etc., R. R. Co.*, 20 Mich. 105; *Stafford v. Chicago, etc., R. R. Co.*, 114 Ill. 244, 14 Am. Neg. Cas. 280, *ante*; *Dillon v. Union Pac. R. R. Co.*, 3 Dillon (U. S. C. C.) 319; *Leary v. Boston, etc., R. R. Co.*, 139 Mass. 580; *Hughes v. Winona, etc., R. R. Co.*, *supra*.

In the case in hand, appellee has not alleged, nor attempted to allege, any excuse whatever for his remaining in appellant's service after he knew, or ought to have known, of Pool's negligent habits. We think, therefore, that appellant's second objection to the sufficiency of the first paragraph of appellee's complaint herein is also well taken, and ought to have been sustained.

For the reasons given we are of opinion that the trial court clearly erred in overruling appellant's demurrer to the first paragraph of appellee's complaint herein. This conclusion requires a reversal of the judgment below, and, therefore, renders it unnecessary for us to consider or decide now any of the questions discussed by counsel, arising under the alleged error of the court in overruling the motion for a new trial.

The judgment is reversed, with costs, and the cause is remanded with instructions to sustain the demurrer to the first paragraph of the complaint, and for further proceedings not inconsistent with this opinion.

EMPLOYEE, LIGHTING LAMP, INJURED BY BREAKING OF LADDER — NOTICE OF DEFECT — PROMISE TO REPAIR. — In **MEADOR v. LAKE SHORE & MICHIGAN SOUTHERN R'Y CO.**, 138 Ind. 290 (*June, 1894*), judgment for defendant in the Elkhart Circuit Court was *affirmed*, it being held (as per syllabus to the official report) that: "Where an employee, whose duties require him to use a ladder, discovers that the ladder is defective and dangerous, and notifies the master, who promises to furnish another, but before doing so the employee, in using the defective ladder, is injured, the master is not liable, although the service in which the ladder was used was of a kind which could not be postponed." Plaintiff's duty, as an employee of defendant, was to light and extinguish lamps at a street crossing, which duty required the use of a ladder. While using the ladder it gave way, throwing plaintiff upon the ground and he was injured. [The court cited similar cases affecting the use of a defective ladder after promise of the master to repair same or furnish another, among them being *Marsh v. Chickering*, 101 N. Y. 396, and *Corcoran v. Milwaukee Gas Light Co.*, 81 Wis. 191.]

ASSUMPTION OF RISK — RULES AND REGULATIONS — PASSENGER KILLED. — In **WOOLERY, ADM'R, v. LOUISVILLE, NEW ALBANY & CHICAGO R'Y CO.**, 107 Ind. 381 (*September, 1886*), passenger killed by jumping off freight train to avoid imminent danger, it was held (as per MITCHELL, J., stated in syllabus of official report) that "when a person becomes a passenger on a freight train, he assumes the risks necessarily and reasonably incident to being carried by that method; but it is the duty of the railway company to exercise the highest degree of care for the safety of such passengers, consistent with the usual and practical operation of freight trains, and the same presumptions arise in favor of a passenger who is injured while submitting to the regulations of the company as in the case of a passenger on any other train." Judgment for railway company affirmed.

PECULIAR ACCIDENT TO LABORER ON FLAT CAR — CAUGHT BY WIRE WHICH BECAME DETACHED, FELL ON FREIGHT CAR AND WAS CARRIED TO FLAT CAR — RAILROAD NOT LIABLE. — In **WABASH, ST. LOUIS & PACIFIC R'Y CO. AND THE WESTERN UNION TELEGRAPH CO. v. LOCKE, ADM'R**, 112 Ind. 404 (*November Term, 1887*), employee, loading flat cars, killed while on flat car by a wire which dragged him from the car, said wire having previously caught a brakeman who was on top of a freight car, which wire being detached fell on

top of moving car and the brake handle caught the wire and carried it forward on the moving train, and then in some unaccountable manner the wire coiled around the body of plaintiff's intestate which dragged him from the car, there was a verdict against both defendants, but a judgment against the railway company alone was rendered in the Wabash Circuit Court. On appeal the judgment was *reversed*, the Supreme Court, after a full discussion of the case, and numerous authorities, holding that there was no evidence from which a reasonable inference could arise that the railroad company had omitted any precaution which prudent persons engaged in like business would have taken. New trial granted.

**BRIDGE CARPENTER STEPPING FROM TRAIN AND KILLED BY ANOTHER TRAIN — RAILROAD NOT LIABLE.** — In **STEWART, ADM'R, V. PENNSYLVANIA COMPANY**, 130 Ind. 243 (*January, 1892*), appeal from judgment rendered for the railway company in an action tried in the Scott Circuit Court for damages for death of plaintiff's intestate, a bridge carpenter, who was struck and killed by a rapidly moving train, judgment was *affirmed* (1). **MCBRIDE**, J., in his opinion, said:

"It is well settled, that the general averment of freedom from fault will be overcome, if the facts specially pleaded show that the injured party was guilty of negligence which contributed to his injury.

"It is not averred that the decedent was ignorant of the manner in which, and times when, trains were run at the point where he was killed. Indeed, the averments of the complaint, coupled with the inferences which we are authorized to draw from the facts pleaded, are sufficient to charge him with full notice on that subject. He was working for the appellee on a bridge at that particular point, where he could not fail to have his attention drawn to all trains passing over the road during working hours, as they would, of necessity, pass over the bridge. He would, also, in the same manner, become familiar with the speed at which they were run. The complaint shows that every morning and evening he was conveyed

1. In **BIER v. JEFFERSONVILLE, MADISON & INDIANAPOLIS R. R. Co.**, 132 Ind. 78 (*May, 1892*), stone mason injured while assisting in the construction of a bridge for the railway company, being struck by a heavy piece of timber which was carelessly knocked off the bridge by other employees who were bridge carpenters, judgment in the Jackson Circuit Court sustaining demurrer to complaint was *affirmed*. The complaint was defective in not alleging freedom from contributory negligence. It was held that plaintiff and the bridge carpenters were co-employees for whose negligence the employer was not liable.

to and from his work on one of the trains. It does not need the express averments of the complaint to inform us that while two trains were passing each other it was a dangerous place to disembark. He knew that the train that killed him was due, or might be expected at that time, for it is averred that he 'looked and listened for said coming train, as aforesaid, to ascertain if it was safe for him to get off on that side, or at that time.' As he looked and listened his senses must have warned him that it was unsafe, for the complaint informs us that the escaping steam and smoke from the engine on his own train, settling around him, rendered sight unavailing, while the noise of escaping steam from the same source made it impossible to hear the sound of an approaching train. He knew, therefore, as he stepped off the train, that he was deliberately stepping into danger to avoid the inconvenient, but safe landing on the other side. He erred as to the imminence of the danger, and the error cost him his life. In our opinion the facts specially pleaded overcome the general averments of freedom from fault, and show, if they are true, that the decedent's death, whether partially due to negligence on the part of the appellee or not, was certainly, in some measure, due to his own negligence. A person is bound to use the senses, and exercise the reasoning faculties with which nature has endowed him. If he fails to do so, and is injured in consequence, neither he, in life, nor his representatives after his death, can recover for resulting injuries. *City of Plymouth v. Miller*, 117 Ind. 324; *Lake Shore, etc., R'y Co. v. Pinchin*, 112 Ind. 592; *Brazil Block Coal Co. v. Hoodlet*, 129 Ind. 327." \* \* \*

#### NOTES OF INDIANA CASES RELATING TO INJURIES SUSTAINED BY RAILROAD EMPLOYEES.

##### 1. Brakemen injured.

###### 1. COUPLING AND UNCOUPLING CARS.

- a. *Defective appliance.*
- b. *Defective track.*
- c. *Falling from car.*

###### 2. COLLISION.

###### 3. DERAILMENT.

###### 4. FALLING OBJECT.

###### 5. FALLING OR THROWN FROM CAR.

###### 6. OBJECT NEAR TRACK.

##### 2. Coupling and uncoupling cars.

##### 3. Conductors injured.

- a. *Defective appliance.*
- b. *Defective car.*
- c. *Defective track.*
- d. *Collision.*

**4. Firemen injured.**

- a. Collision.
- b. Object near track.
- c. Parting of engine and tender.

**5. Injured on construction trains, flat cars, hand cars, etc.****6. Section hands injured.**

- a. Loading and unloading
- b. Explosion.

**7. Switchmen injured.****8. Track hands injured.****9. Tunnel accidents.****10. Watchmen injured.****11. Machinists injured.****12. Miscellaneous.****1. Brakemen injured.****I. COUPLING AND UNCOUPLING CARS.**

- a. Defective appliance.
- b. Defective track.
- c. Falling from car.

**a. Defective appliance.**

In INDIANA BLOOMINGTON & WESTERN R'Y CO. v. DAILEY, 110 Ind. 75 (November Term, 1886), brakeman injured by defective coupling pin, the negligence charged being alleged incompetency of engineer, judgment for plaintiff was reversed, the complaint being insufficient.

In LOUISVILLE, NEW ALBANY & CHICAGO R'Y CO. v. BUCK, ADM'R, 116 Ind. 566 (November Term, 1888), brakeman fatally injured while uncoupling cars, due to defective appliances, judgment for plaintiff in the Benton Circuit Court was affirmed. The injury occurred on a Sunday, but the fact that it occurred on such day does not prevent recovery therefor.

In OHIO & MISSISSIPPI R'Y CO. v. PEARCY, ADM'X, 128 Ind. 197 (November Term, 1890), brakeman killed by alleged defective brake, judgment for plaintiff in the Jennings Circuit Court was affirmed.

In LOUISVILLE, NEW ALBANY & CHICAGO R'Y CO. v. BERKEY, ADM'R, 136 Ind. 181 (November Term, 1893), brakeman, coupling cars, fatally injured by the breaking of coupling pin, judgment on special verdict rendered for plaintiff in the Orange Circuit Court for \$4,500 was affirmed and petition for rehearing overruled.

LOUISVILLE, NEW ALBANY & CHICAGO R'Y CO. v. BATES, ADM'R, 146 Ind. 564 (November Term, 1896); brakeman killed while coupling cars; latent defects in foreign cars; inspection; special findings on question of inspection mere conclusions; car inspector not shown to be incompetent; judgment for plaintiff in the Newton Circuit Court reversed.

PITTSBURGH, CINCINNATI, CHICAGO & ST. LOUIS R'Y CO. v. WOODWARD, 9 Ind. App. 169 (November Term, 1893); brakeman injured by reason of defects in the track and cars; defective draw-bar; judgment for plaintiff in the Scott Circuit Court affirmed and petition for rehearing overruled.

INDIANAPOLIS UNION R'Y CO. v. OTT, 11 Ind. App. 564 (November Term, 1894); brakeman injured while coupling cars, resulting in loss of arm; defective lantern, the light of which went out while plaintiff was coupling cars; judgment

for plaintiff in the Marion Superior Court for \$2,000, on general verdict; at special term defendant's motion for judgment on answers to interrogatories, notwithstanding general verdict, was sustained, which, however, was reversed on appeal to general term; on appeal to Supreme Court judgment for plaintiff affirmed and petition for rehearing overruled.

*CHICAGO & ERIE R. R. Co. v. WAGNER*, Adm'r, 17 Ind. App. 23 (November Term, 1896); brakeman killed while attempting to couple cars of gravel train; defective construction of cars; judgment for plaintiff in the Huntington Circuit Court was reversed, on the ground that deceased assumed the risks of service, and that the burden was on plaintiff to show that deceased did not assume the risks. Rehearing denied.

*b. Defective track.*

In *THAYER v. ST. LOUIS, ALTON & TERRE HAUTE R. R. Co.*, 22 Ind. 26 (May Term, 1864), brakeman falling into culvert, while detaching cars from engine to run them onto switch under orders from conductor, judgment for railway company affirmed, the fellow-servant rule being applied.

In *LAKE SHORE & MICHIGAN SOUTHERN R'y Co. v. McCORMICK*, 74 Ind. 440 (May Term, 1881), brakeman, coupling cars, caught in defective frog on track, judgment for plaintiff in the Laporte Circuit Court was reversed and petition overruled, the evidence showing that the injury was the result of an accident and not due to negligence of defendant, which must be deemed as the risk of the service. The case of *St. Louis, etc., R'y Co. v. Valirius*, 56 Ind. 511, was criticized as to its ruling on the question of the duty of railroad companies to adopt improved machinery, ordinary care to keep machinery, etc., in good repair being all that is required. The McCormick ruling and criticism was followed in *Umback v. Lake Shore, etc., R'y Co.*, 83 Ind. 191.

In *PENNSYLVANIA CO. v. O'SHAUGHNESSY*, Adm'r, 122 Ind. 588 (November Term, 1889), plaintiff's intestate, a brakeman in defendant's employ, struck and killed by train, judgment for plaintiff in the Allen Circuit Court was reversed, on the ground of contributory negligence. The decision is stated in the fifth paragraph of the syllabus to the official report as follows: "Where a brakeman is ordered to go to a switch and two ways are open to him, one entirely safe and the other very perilous, and he leaves the safe way, after having gone upon it, and voluntarily takes the dangerous one, knowing the danger to which he exposes himself and using no precaution to avert it, and is run over by a train moving along the track on which he is walking, he is guilty of contributory negligence and cannot recover."

In *AMES, Adm'r, v. LAKE SHORE & MICHIGAN SOUTHERN R'y Co.*, 135 Ind. 363 (May Term, 1893), brakeman and conductor of switch engine, walking along track at night towards switch for purpose of coupling cars, caught in opening and run over and killed, judgment for defendant in Elkhart Circuit Court was affirmed, the employee having equal opportunity to know of the defect as the company had, and the complaint not showing that he did not have knowledge of such defect, the employee will be presumed to have assumed the risk.

In *SHEETS, Adm'r, v. CHICAGO & INDIANA COAL R'y Co.*, 139 Ind. 682 (November Term, 1894), brakeman, attempting to couple cars, run over and killed by reason of his foot catching in an unblocked frog or switch angle, the cars being "kicked" into switch, it was held that the deceased assumed the risks of employment. Judgment for defendant in the Fountain Circuit Court was affirmed.

CHICAGO & ERIE R. R. CO. v. LEE, ADM'R, 17 Ind. App. 215 (November Term, 1896); brakeman, while attempting to couple cars, catching his foot between one of the ties and two signal wires on the track which were unboxed, whereby he was held and was unable to extricate same, in consequence of which the train, which was being moved backward, ran over and killed him; judgment for plaintiff on special verdict rendered in the Huntington Circuit Court was reversed for erroneous admission of opinion of witness as to how accident happened, based on conclusions drawn by him some time after accident.

c. *Falling from car.*

In LOUISVILLE, EVANSVILLE & ST. LOUIS CONSOLIDATED R'Y CO. ET AL. v. UTZ, ADM'R, 133 Ind. 265 (November Term, 1892), brakeman, coupling cars, thrown from top of car and killed by cars suddenly separating owing to breaking of coupling pin, judgment for plaintiff in the Floyd Circuit Court was affirmed.

LOUISVILLE, NEW ALBANY & CHICAGO R'Y CO. v. HOBB ET AL., 3 Ind. App. 445 (November Term, 1891); brakeman, attempting to get through window on top of caboose to perform his duty, falling between cars, run over and killed; judgment for plaintiff for \$750 in the Jackson Circuit Court affirmed.

**Brakemen injured.**

2. COLLISION.

In ROBERTSON v. TERRE HAUTE & INDIANAPOLIS R. R. CO., 78 Ind. 77 (November Term, 1881), brakeman injured in collision between trains, caused by negligence of train dispatcher, judgment for defendant in the Vigo Circuit Court was affirmed, the fellow-servant rule being applied. "The brakeman and train dispatcher, though many miles apart, and with distinct duties, are nevertheless co-servants in the accomplishment of the same general object."

In EVANSVILLE & TERRE HAUTE R. R. CO. v. GUYTON, 115 Ind. 450 (May Term, 1888), brakeman injured in collision resulting from incompetency of conductor of train on which he was performing his duties, judgment for plaintiff was affirmed.

In KENTUCKY & INDIANA BRIDGE CO. v. HALL, 125 Ind. 220 (May Term, 1890), brakeman, in employ of another railroad, injured in collision with a train of another company caused by negligence of defendant's flagman at crossing, judgment for plaintiff in the Floyd Circuit Court was affirmed.

In OHIO & MISSISSIPPI R'Y CO. v. STEIN, 140 Ind. 61 (November Term, 1894), brakeman injured in collision of detached car, loaded with stone, against an engine, caused by defective brake and appliances, judgment for plaintiff in the Jefferson Circuit Court was affirmed. See also former appeal in the STEIN case, 133 Ind. 243.

**Brakemen injured.**

3. DERAILMENT.

BALTIMORE & OHIO SOUTHWESTERN R'Y CO. v. WELSH, 17 Ind. App. 505 (November Term, 1896); brakeman injured by construction train leaving the track; defective roadbed; judgment for plaintiff on general verdict rendered in the Lawrence Circuit Court was reversed, and judgment on the special findings ordered to be entered for railway company; held, that plaintiff, knowing that road was in course of construction and was incompletely, by accepting service assumed the risks incident thereto.

**Brakemen injured.****4. FALLING OBJECT.**

LOUISVILLE, NEW ALBANY & CHICAGO R'Y CO. v. SOUTHWICK, 16 Ind. App. 486 (November Term, 1896); brakeman, engaged with conductor in unloading freight, injured by fall of piano caused by conductor stepping into hole in floor of car whereby he lost his hold on the piano; held, that the hole in car was not the proximate cause of injury and company not liable; also that the brakeman and conductor were fellow-servants; judgment for plaintiff in the Newton Circuit Court reversed.

**Brakemen injured.****5. FALLING OR THROWN FROM CAR.**

In WILSON v. MADISON & INDIANAPOLIS R. R. CO., 18 Ind. 226 (May Term, 1862), brakeman thrown from top of car by sudden start of train without signal from engineer and conductor, judgment on demurrer to complaint affirmed, the employees being fellow-servants.

KENTUCKY & INDIANA BRIDGE CO. v. EASTMAN, 7 Ind. App. 514 (May Term, 1893), brakeman falling against defective gate on platform of car and thrown from train; judgment for plaintiff in the Floyd Circuit Court reversed for erroneous instruction as to employee's knowledge of defect.

LAKE SHORE & MICHIGAN SOUTHERN R'Y CO. v. KURTZ, 10 Ind. App. 60 (November Term, 1893); brakeman injured by being thrown from car by breaking of the brakeshaft; judgment for plaintiff in the Elkhart Circuit Court for \$1,217.41 was reversed, there being no direct averment in the complaint that the defendant had any notice of the defect in the brakeshaft, nor were there any other facts averred from which notice of the defect followed as a necessary inference; under the rulings in certain cases and in view of the statute, Act of 1893, p. 31, § 3 of the Act of February 16, 1893, it was held that the complaint was insufficient, and demurrer to complaint should have been sustained.

LOUISVILLE, EVANSVILLE & ST. LOUIS CONSOLIDATED R'Y CO. v. HICKS, 11 Ind. App. 588 (November Term, 1894); brakeman passing over coal cars while train was going at great speed down hill, the brakes not working owing to defects, thrown from car by the coal giving way under him, and seriously injured; improper loading of coal car; judgment for plaintiff in the Floyd Circuit Court affirmed.

BALTIMORE & OHIO & CHICAGO R. R. CO. ET AL. v. LEATHERS, 12 Ind. App. 544 (May Term, 1895); brakeman injured by falling from top of freight car; defective construction of car; judgment for plaintiff in the De Kalb Circuit Court affirmed.

**Brakemen injured.****6. OBJECT NEAR TRACK.**

In PENNSYLVANIA CO. v. FINNEY, ADM'R, 145 Ind. 551 (May Term, 1896), it was held (as per syllabus to official report) that "a railroad brakeman is guilty of contributory negligence in descending a ladder at the side of the car, for his own purposes, with his face toward the car, without looking for a water plug or crane standing so near the car as to be dangerous, which was open and obvious to all, and which he had passed almost daily for six months preceding the accident." The brakeman was thrown to the ground and run over and

fatally injured. Judgment for plaintiff in the Allen Superior Court was *reversed* and petition for rehearing overruled.

## 2. Coupling and uncoupling cars.

In INDIANAPOLIS & ST. LOUIS R'Y CO. v. JOHNSON, 102 Ind. 352 (May Term, 1885) switchman injured coupling cars caused by alleged negligent loading of cars with rails whereby his hand was injured, judgment for plaintiff in the Vigo Superior Court was *reversed* and petition for rehearing overruled, fellow-servant rule being applied.

In LAKE ERIE & WESTERN R. R. CO. v. MUGG, ADM'R, 132 Ind. 168 (June 1892), judgment for plaintiff in the Tippecanoe Circuit Court was *affirmed* and petition for rehearing overruled. The complaint charged that plaintiff's intestate, William Mugg, was in defendant's employ as a yard switchman, part of his duties being to couple and uncouple cars in the yards; that on and before January 22, 1888 (the date of the accident) there was in a side track, where the intestate was engaged, a defective, unsafe, insufficient and dangerous rail caused by there being a strong and sharp piece of rail called a sliver, which extended outward and along the outside of the rail; that such defect was known to the defendant; that on the date aforesaid decedent, to make coupling of cars, had to approach at a point where the said sliver was, and while moving his foot across the rail, the said sliver caught and became fastened in the heel of the shoe or boot then and there on decedent's foot, and he could not withdraw the same, and while his foot was so fastened the wheels of the car ran over it and he was so injured that he died; that the decedent did not know of such defect and was without negligence, etc.

In WABASH & WESTERN R'Y CO. v. MORGAN, 132 Ind. 430 (June, 1892), yard-master, coupling cars, struck by car which collided with another car owing to sudden start of engine which was defective, plaintiff's hand being crushed, judgment for plaintiff in the De Kalb Circuit Court was *affirmed* and petition for rehearing overruled.

In EVANSVILLE & TERRE HAUTE R. R. CO. v. DUEL, 134 Ind. 156 (November Term, 1892), employee, coupling cars, injured by his hand being caught between cars, by reason of defective throttle on engine causing a car to move suddenly and swiftly, judgment for plaintiff in the Vanderburgh Superior Court was *reversed*, the complaint not alleging company's knowledge of defect, etc.

In OHIO & MISSISSIPPI R'Y CO. v. DUNN, 138 Ind. 18 (March, 1894), judgment for plaintiff in the Floyd Circuit Court was *reversed*. Plaintiff was injured while coupling cars in making up a train of freight cars in defendant's switch yards, the negligence charged being an unskilled engineer, an unskilled associate switchman, and maintaining a coupling-link so out of repair that it could not be raised and adjusted to the head of the opposite draw-bar, whereby plaintiff's hand was injured. Held, that the evidence did not satisfactorily sustain plaintiff's allegations of negligence, and it was reversible error to refuse to give defendant's requested instruction to that effect. Petition for rehearing overruled.

CHICAGO, ST. LOUIS & PITTSBURGH R. R. CO. v. CHAMPION, 9 Ind. App. 510, (November Term, 1893); switchman or yard brakeman, while moving cars for the purpose of coupling them, injured by his hand being caught between the draw-bars due to sudden release of brakes of moving car by an alleged incompetent brakeman in defendant's employ; judgment for plaintiff in the Marion Superior Court for \$2,250 *affirmed*; petition for rehearing overruled.

**3. Conductors injured.**

- a. Defective appliance.*
- b. Defective car.*
- c. Defective track.*

*e. Defective appliance.*

In CINCINNATI, HAMILTON & DAYTON R. R. Co. *v.* McMULLEN, ADM'R, 117 Ind. 439 (November Term, 1888), conductor on defendant's freight train run over and killed by train, being thrown from car while attempting to control it by using brake, the handle of which suddenly gave way or slipped off, causing the decedent to lose his balance and fall between the moving cars in the railroad yard, judgment for plaintiff in the Wayne Circuit Court was *affirmed*. It was held that "a car inspector, in the employment of a railroad company, upon whom is enjoined the duty of inspecting the company's cars, is not a co-employee of a brakeman, or of a conductor of a freight train who, in the line of his service, is discharging the duties of brakeman, within the meaning of the common-law rule exempting a master from liability for the negligence of a fellow-servant." Held, also, that "the rules of another separate and apparently independent railroad company are not competent evidence to show the duties of a conductor on the defendant's road, until it is shown by competent evidence that they had been adopted and promulgated as the rules of the defendant."

*b. Defective car.*

In FORT WAYNE, CINCINNATI & LOUISVILLE R. R. Co. *v.* GRUFF, 132 Ind. 13 (May, 1892), conductor of freight train injured by a defective car, transferred from another road, while placing it in his own train, judgment for plaintiff in the Allen Circuit Court was *reversed*, the complaint being defective in that it did not allege freedom from contributory negligence. It was also held that "if the employee of a railroad company is injured by reason of defects in a car transferred to said company by another railroad, and by the rules of the company known to said employee, it is his duty to inspect said car; he cannot recover for injuries caused simply by his failure to make the inspection."

In LOUISVILLE, EVANSVILLE & ST. LOUIS CONSOLIDATED R. R. Co. *v.* MILLER, ADM'X, 140 Ind. 685 (November Term, 1894), freight conductor killed by defective cars breaking down and defective track giving way, judgment for plaintiff in the Floyd Circuit Court was *affirmed*.

EVANSVILLE & RICHMOND R. R. CO. *v.* MALOTT, 13 Ind. App. 289 (May Term, 1895); conductor, on freight train, injured by defective coal car while attempting to couple car in making up work train in railroad yard; employee's hip injured; judgment for plaintiff in the Lawrence Circuit Court *affirmed*.

*c. Defective track.*

In PENNSYLVANIA CO. *v.* BRUSH, ADM'X, 130 Ind. 347 (October, 1891), yard conductor, while coupling cars in railroad yard, thrown on track by foot coming in contact with defective tie, run over and killed, judgment for plaintiff in the Whitley Circuit Court was *affirmed* and petition for rehearing overruled. The syllabus to the official report states the case as follows:

"In an action for the death of plaintiff's decedent, alleged to have been caused by the defendant's negligence, the complaint alleged that while the decedent a yard conductor in the employ of the defendant, was making up a train and coupling cars his foot caught under the slivered portion of a defective tie whereby he was, without fault on his part, thrown down on the track, run over and

killed; that the decedent had no knowledge of the defective tie which caused his injury, and that the defendant had knowledge of such defect long enough before the decedent was injured to have repaired the same, but negligently failed and refused to make such repairs: *Held*, that the complaint stated a cause of action."

#### 4. Firemen injured.

- a. Collision.
- b. Object near track.
- c. Parting of engine and tender.

##### a. Collision.

**TERRE HAUTE & INDIANAPOLIS R. R. Co. v. BECKER**, ADM'x, 146 Ind. 202 (May Term, 1896); fireman, on freight train, killed in collision with "wild train;" rule as to employees keeping out of way of certain trains; railroad not liable for violation of rule; judgment for plaintiff *reversed* with instructions to render judgment for defendant on special verdict.

**LAKE SHORE & MICHIGAN SOUTHERN R. R. Co. v. WILSON**, ADM'x, 11 Ind. App. 488 (November Term, 1894); fireman killed in collision, the train on which he was firing having run off the main track, by reason of switch being left open, and onto the side track, colliding with a freight train standing thereon; judgment for plaintiff for \$2,000 in the De Kalb Circuit Court *affirmed* and petition for rehearing overruled.

##### b. Object near track.

In **NEW YORK, CHICAGO & ST. LOUIS R. R. Co. v. OSTMAN**, ADM'x, 146 Ind. 452 (November Term, 1896), fireman, leaning out of cab window looking backward for signals, striking his head against a cattle chute which stood thirteen inches from the window, and killed, judgment for plaintiff for \$4,000 in the Allen Circuit Court was *reversed*; contributory negligence of deceased, he knowing the danger at the place of accident.

##### c. Parting of engine and tender.

In **KRUEGER, ADM'R, v. LOUISVILLE, NEW ALBANY & CHICAGO R'Y CO.**, 111 Ind. 51 (November Term, 1886), fireman killed by the parting of the engine and tender, judgment for defendant in the Laporte Circuit Court was *reversed*. The third paragraph of the syllabus to the official report states the case as follows:

"By order of the division master mechanic of a railroad company, a tender belonging to one engine was attached to another of different construction, its deck being three to four inches higher than that of the engine. The use of the locomotive as thus constituted was rendered dangerous, by reason of lost motion and the liability of the tender to become detached, and the engineer so notified the master mechanic. While the fireman was engaged in shoveling coal into the fire-box, the engine and tender parted and the fireman was killed. *Held*, that the company is liable."

#### 5. Injured on construction trains, flat cars, hand cars, etc.

In **EVANSVILLE & RICHMOND R. R. Co. v. BARNES**, 137 Ind. 306 (November Term, 1893), judgment for plaintiff in the Monroe Circuit Court was *reversed*, the first paragraph of the syllabus to the official report stating the case as follows: "Where a railroad employee, superintendent of bridges and assistant superintendent of construction, brings suit for damages for injuries sustained

by the derailment of a construction train on which he was riding at the time of the injury complained of, the track being half tied and not ballasted, of which facts plaintiff had knowledge, and had just preceding the accident inspected the bridge and approaches, upon which the accident occurred, the plaintiff sustains the position of complaining of the defective condition of the railroad which he was employed to assist in making perfect, and he cannot recover, the risk being an assumed one; and it is immaterial in what capacity the plaintiff was acting when he inspected the bridge and approaches."

The court distinguished the BARNES case from the HENDERSON case, an action arising out of the same accident, as in the latter case the plaintiff was an inexperienced minor employee, while the BARNES case was that of an experienced railroad man and an adult, and in lieu of a mere employee Barnes was the superintendent of bridges, etc. See Evansville & Richmond R. R. Co. v. Henderson, 134 Ind. 636 and 142 Ind. 596, note of which appears in this volume, page 541, *ante*.

In PITTSBURGH, CINCINNATI & ST. LOUIS R'Y CO. v. KIRK, 102 Ind. 399 (May Term, 1885), section foreman, in employ of another company, injured in collision of hand car on which he was riding with hand car of defendant company in charge of such company's foreman, the negligence of the latter causing the injury, judgment for plaintiff in the Marion Superior Court was *affirmed*.

In PENN. CO. v. McCAFFREY, ADM'X, 139 Ind. 430 (November Term, 1894), section-boss attempting to get hand car out of way of backing train, but being unable to do so attempting to step off track and fell and killed by hand car being pushed upon him by the train, judgment for plaintiff in the Clark Circuit Court was *affirmed*.

In JACKSON v. INDIANAPOLIS & ST. LOUIS R. R. CO., 47 Ind. 454 (November Term, 1874), employee, engaged in loading certain gravel cars at a gravel pit along defendant's line of road, injured while on gravel train by a construction train colliding against it, being thrown upon track, run over and leg injured, judgment for defendant in the Vigo Common Pleas was *affirmed*. It must appear from the complaint by express averment, or it must be clearly manifest from the facts alleged in the complaint that the injury occurred without the fault or negligence of the injured party. The complaint in the Jackson case was fatally defective in this respect.

In GORMLEY, ADM'R, v. OHIO & MISSISSIPPI R'Y CO., 72 Ind. 31 (November Term, 1880), section hand, riding on hand car to work, killed in collision between freight train and hand car, judgment for defendant company in the Martin Circuit Court was *affirmed*, the fellow-servant rule being applied.

In CINCINNATI, INDIANAPOLIS, ST. LOUIS & CHICAGO R'Y CO. v. LANG, ADM'X, 118 Ind. 579 (November Term, 1888), section hand, riding on hand car, fatally injured in collision with a "wild" train on a short curve of the road, judgment for plaintiff in the Dearborn Circuit Court was *reversed*, the fellow-servant rule being applied.

In JUSTICE v. PENNSYLVANIA CO., 130 Ind. 321 (February, 1892), section hand, struck by lever of hand car which he was propelling, it being alleged that the section foreman permitted another hand car to be negligently run against plaintiff's car, judgment for defendant in the Clark Circuit Court was *affirmed*. As far as hiring and discharging employees was concerned the section foreman was a vice-principal, but in the matter of transporting the men to and from their work on the hand car he was not, as the men using the hand cars were, fellow-servants. The complaint failed to show a cause of action against the

railway company for negligence of foreman as vice-principal. The fellow-servant rule was fully discussed.

In CINCINNATI, INDIANAPOLIS, ST. LOUIS & CHICAGO R'Y CO. v. DARLING, 130 Ind. 376 (November Term, 1891), day laborer employed to shovel dirt and gravel on defendant's track, riding on a tender to an engine to go to his place of work, injured in a collision with an engine and cars, judgment for plaintiff in the Ohio Circuit Court was *reversed*, the evidence not justifying the verdict. Questions of practice were discussed.

In INDIANA, ILLINOIS & IOWA R'Y CO. v. SNYDER, ADM'R, 140 Ind. 647 (November Term, 1894), section hand, operating hand car, killed by reason of car handle breaking, judgment for plaintiff in the Jasper Circuit Court was *affirmed*. A full discussion of the duty of master to provide safe machinery and appliances, the question of vice-principal and fellow-servant, and duty to inspect, appears in the opinion rendered by JORDAN, J.

EVANSVILLE & RICHMOND R. R. CO. v. DOAN, 3 Ind. App. 453 (November Term, 1891); laborer, upon construction train, injured by train being thrown from track; defective roadbed; judgment for plaintiff in the Jackson Circuit Court *affirmed*.

COOPER v. WABASH R. R. CO., 11 Ind. App. 211 (May Term, 1894); section hand, riding on flat car, injured by being thrown over corner of front end of car by violent stop of engine which caused reaction and jerk; judgment for defendant railway company in Warren Circuit Court *affirmed*.

LAKE SHORE & MICHIGAN SOUTHERN R'Y CO. v. MALCOM, 12 Ind. App. 612 (May Term, 1895); employee, shoveling gravel from flat cars of gravel train to the ground, injured by falling from car owing to sudden stop of train without warning; judgment for plaintiff in the Elkhart Circuit Court *reversed*, for error in refusing testimony tending to show whether or not plaintiff assumed the risk of the danger.

#### **6. Section hands injured.**

- a. *Loading and unloading.*
- b. *Explosion.*

##### *a. Loading and unloading.*

In CINCINNATI, HAMILTON & INDIANAPOLIS R. R. CO. v. MADDEN, 134 Ind. 462 (November Term, 1892), track hand, acting as section boss, in unloading steel rails from a car, thrown from car by violent jerk of train caused by incompetent engineer, run over and leg injured, judgment for plaintiff in the Henry Circuit Court was *affirmed*.

LOUISVILLE, NEW ALBANY & CHICAGO R'Y CO. v. ISOM, 10 Ind. App. 691 (May Term, 1894); section hand injured by fall of rail while loading rails on car, under direction of the foreman; judgment for plaintiff in the Monroe Circuit Court *reversed* on the ground that the negligence, if any, was that of the foreman, who being engaged in the same service as plaintiff was a fellow-servant of plaintiff, for which the railroad company was not liable.

##### *b. Explosion.*

CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS R. R. CO. v. MARTIN, ADM'R, 13 Ind. App. 485 (May Term, 1895); section hand, while eating dinner in the defendant's pump house, fatally injured by reason of the explosion of a defective boiler; the controlling question in the case was whether, under the circumstances, eating his dinner on the premises where he was at work is shown to

have been an incident to the service of the decedent, and whether there was an invitation, express or implied, by the railway company, to him to go to the pump house on the line of its railway near the place where he was engaged in such work, for the purpose of eating his dinner therein; judgment on special verdict for plaintiff in the Fountain Circuit Court *reversed* on the ground that the finding of the jury was not sufficient to sustain the judgment for the reason, if for no other, that it failed to find the essential ultimate fact that decedent was in the pump house in the line of his duty by implied invitation of the railway company.

#### 7. Switchmen injured.

In CINCINNATI, INDIANAPOLIS, ST. LOUIS & CHICAGO R'Y CO. v. LONG, ADM'R, 112 Ind. 166 (May Term, 1887), switchman, in employ of another company, killed by backing train of defendant while attending to switch, judgment for plaintiff in the Marion Circuit Court was *reversed* on the ground, among others, of contributory negligence.

#### 8. Track hands injured.

In OHIO & MISSISSIPPI VALLEY R'Y CO. v. COLLARN, 73 Ind. 261 (May Term, 1881), track laborer, engaged in repairing track, struck and run over by engine whereby his leg was crushed, judgment for plaintiff in the Washington Circuit Court for \$7,000 was *affirmed*. Among the points decided were the following:

"Where the engineer of a locomotive places it in the hands of a fireman incompetent to manage it, contrary to the rules of the railroad company in whose employ he is, he is guilty of negligence.

"A railroad company is guilty of negligence in permitting its order forbidding firemen to handle its engines to be violated by its engineers, and retaining them in its employ after notice of their practice of abandoning their engines to the firemen, which practice led to the placing of an engine in the hands of a careless and incompetent fireman, whereby injury to a co-employee occurred.

"Notice to the master mechanic of such company, whose duty it was to employ and discharge engineers and firemen, of their practice in violating its orders, is notice to the company."

In CINCINNATI, INDIANAPOLIS, ST. LOUIS & CHICAGO R'Y CO. v. ROESCH, 126 Ind. 445 (November Term, 1890), trackman, engaged in raising track, injured by fall of appliance used in unloading gravel from cars, judgment for plaintiff in the Decatur Circuit Court was *affirmed*.

In NALL, ADM'X, v. LOUISVILLE, NEW ALBANY & CHICAGO R'Y CO., 129 Ind. 260 (May Term, 1891), judgment for defendant in the Orange Circuit Court was *reversed* and petition for rehearing overruled on the ground that the deceased did not assume the risk and that a person directing certain work was not a fellow-servant of the injured employee. "The deceased was a track hand, or section hand, who had been employed in railroad work only about two weeks when he was killed. A heavy freshet in Salt creek, Lawrence county, caused a large accumulation of drift-wood and other debris against one of appellee's bridges which spanned said creek, and endangered its safety to such an extent that it was deemed necessary to call out an extraordinary force of men on Sunday to save the bridge from destruction. The complaint alleged in substance that the appellee intrusted to one Helms the sole and absolute supervision over and direction of the task of saving the bridge, and that, acting under the authority thus conferred, he called upon and required a large number of employees, belonging to

various departments of appellee's service, to assist in said work, he alone directing and commanding how such work should be done and who should do it." While engaged in such work, a rope attached to an engine used in the work slipped from its place, owing to negligent act of engineer, and struck and killed the plaintiff's intestate. The complaint stated a sufficient cause of action and it was error to sustain demurrer.

#### 9. Tunnel accidents.

In *CAPPER v. LOUISVILLE, EVANSTON & ST. LOUIS R'Y CO.*, 103 Ind. 305 (May Term, 1885), laborer in defendant's employ, working in tunnel, ordered by superintendent of work to board freight train, injured by falling from same and foot run over, judgment for defendant in the Floyd Circuit Court was affirmed, the negligence charged being that of a fellow-servant.

In *LOUISVILLE, NEW ALBANY & CHICAGO R'Y CO. v. GRAHAM, ADM'R.*, 124 Ind. 89 (May Term, 1890), employee, engaged in repairing tunnel, killed by falling stone and dirt and giving way of timbers, judgment for plaintiff in the Lawrence Circuit Court was affirmed.

*LOUISVILLE, NEW ALBANY & CHICAGO R'Y CO. v. QUINN*, 14 Ind. App. 554 (November Term, 1895); employee, foreman of a gang of workmen engaged in preparing tunnel for reconstruction, ordered by the general foreman to bring his gang of men to pull out a certain bent, injured by the fall of other bents, which covered plaintiff with the dirt and debris from above; judgment for plaintiff in the Lawrence Circuit Court reversed, the accident being consequent upon a condition of things with a knowledge of which, both actual and constructive, the servant was as fully chargeable as the master, and as to which no dereliction upon the part of the master appeared.

#### 10. Watchman injured.

In *INDIANAPOLIS & ST. LOUIS R'Y CO. v. WATSON*, 114 Ind. 20 (November Term, 1887), night watchman injured in course of duties in defendant's yard, caused by alleged negligence in failure of company to furnish him with a lantern, judgment for plaintiff was reversed, he having assumed the risks, it not being shown that company had promised to remedy defect.

#### 11. Machinists injured.

In *TAYLOR v. EVANSTON & TERRE HAUTE R. R. CO.*, 121 Ind. 124 (May Term, 1889), machinist, in defendant's shops, injured by the fall of the "equalizer" of a locomotive, a heavy piece of iron, he being directed by master mechanic to remove same for examination, judgment for defendant in the Vanderburgh Superior Court was reversed, the complaint showing a sufficient cause of action, and the fellow-servant rule not applying in this case.

In *ROBERTSON v. CHICAGO & ERIE R. R. CO.*, 146 Ind. 486 (November Term, 1896), employee, working as machinist's helper under a machinist in defendant's repair shops, ruptured in lifting a heavy steam chest cover from locomotive, the work being ordered by the machinist, it was held that the injury was the result of the act of a fellow-servant for which defendant was not liable, and judgment for defendant in the Huntington Circuit Court was affirmed.

*PENNSYLVANIA CO. v. BURGETT*, 7 Ind. App. 338 (May Term, 1893); railroad employee, engaged in his duties as a helper in defendant's shops, injured by upsetting of a wagon load of iron which was being hauled by other employees, due to alleged defective wagon, whereby his leg was broken; judgment for

plaintiff in the Allen Superior Court was reversed for erroneous and misleading instructions as to knowledge of defect.

PENNSYLVANIA CO. v. WITTE, 15 Ind. App. 583 (May Term, 1896); employee, while oiling a certain loose pulley to the shafting of machinery in defendant's shops, injured by his hand being drawn into certain cog-wheels, a belt having slipped from a fast pulley and set a loose pulley in motion; defective appliance; judgment for plaintiff in the Whitley Circuit Court affirmed and petition for rehearing overruled.

## 12. Miscellaneous.

### *Injured by fall of clay in gravel pit.*

In GRIFFIN v. OHIO & MISSISSIPPI R'Y CO., 124 Ind. 326 (May Term, 1890), employee injured by fall of clay in gravel pit, judgment for defendant was affirmed, plaintiff having assumed the risks of employment.

### *Injured by locomotive wheel.*

In LOUISVILLE, NEW ALBANY & CHICAGO R'Y CO. v. CORPS, 124 Ind. 427 (May Term, 1890), employee, engaged in moving large driving wheels of locomotive, injured by wheels being run against him, judgment for plaintiff was reversed for defective pleading on assumption of risk.

### *Injured by act of incompetent servant.*

LOUISVILLE, NEW ALBANY & CHICAGO R'Y CO. v. BREEDLOVE, 10 Ind. App. 657 (May Term, 1894); employee injured by negligent conduct of incompetent and reckless fellow-servants; judgment for plaintiff in the Monroe Circuit Court reversed, a finding in the special verdict that plaintiff did not know of the alleged incompetency but defendant did, but not showing when defendant acquired such knowledge, held not sufficient to charge defendant with negligence.

SECTION HAND, PROPELLING HAND CAR, FALLING ON TRACK — COLLISION BETWEEN HAND CARS — SECTION BOSS A FELLOW-SERVANT OF SECTION HAND. — In CLARKE v. PENNSYLVANIA CO., 132 Ind. 199 (September, 1892), section hand injured in collision between hand cars, judgment for defendant in the Bartholomew Circuit Court was affirmed. The material facts stated as appellant's cause of action (as per opinion of ELLIOTT, J.) are these: He was in the service of appellee, in the capacity of a "section man," and was a member of what was called the "floating gang of section men." His "gang" was under the control of a foreman or "boss," who employed and discharged its members. On August 4, 1886, the "gang," under the control of its foreman, started on a hand car from Jonesville to a point south of that section, where it was to enter upon the work of loading and unloading gravel. On the same day another gang of men, under the control of a "section boss," was engaged in repairing the track, and was riding on a hand car, as custom and duty required. The car on which this gang was riding was following the car on

which the "floating gang" was riding. The car occupied by the appellant was running at the rate of seven miles an hour, and the appellant was propelling the car, standing with his back to the north and to the car which was following. The car occupied by the "section gang" overtook that on which the "floating gang" was riding, and was, through negligence, run against the car in front, causing it to bound forward, and the appellant, being startled by the sudden collision and the act of the "section boss" in placing his hand under his arm, loosened his hold of the propeller, fell back upon the track and the car of the "section boss" ran over him, seriously injuring him. It was held that plaintiff, a section hand, was a fellow-servant of the boss of another "section gang," in the employ of the same railroad company, and therefore the defendant was not liable for the injury occasioned by the negligent running of the hand car which caused the injury to plaintiff. The court cited several cases on the question of fellow-servant, all of which appear with the Indiana cases in this volume of AM. NEG. CAS.

SECTION HAND, IN THE EMPLOY OF ONE COMPANY, STRUCK BY BAGGAGE CAR OF ANOTHER COMPANY.—In **SHONER v. PENNSYLVANIA COMPANY**, 130 Ind. 170 (*November Term, 1891*), judgment for defendant in the Fulton Circuit Court was reversed. From the opinion rendered by McBRIDE, J., it appeared that appellant (plaintiff below) was a section-hand in the service of the Terre Haute & Indianapolis Railroad Company, known as the "Vandalia" road. The track of the Vandalia road crosses that of the appellee (defendant below) "at grade" at Plymouth, Marshall county, and the crossing of the two tracks was embraced in the section on which the appellant worked. On the morning of December 5, 1887, the appellant and a co-employee, named Sullivan, were engaged in making some repairs to the track at the crossing, and while thus engaged were struck by a baggage car which was being pushed over the crossing by one of appellee's locomotives. Sullivan was killed, and the appellant was severely injured. The trial resulted in a general verdict in his favor. Interrogatories were submitted to the jury by both parties, and were answered. The court, on the motion of the appellee, rendered judgment in its favor on the answers to the interrogatories, notwithstanding the general verdict. Appellant appealed. The Supreme Court held the ruling of the trial court to be erroneous and reversed the judgment and petition to change mandate was also overruled.

ENGINEER, IN EMPLOY OF ONE COMPANY, INJURED IN COLLISION CAUSED BY SERVANTS OF ANOTHER COMPANY AT A CROSSING—LICENSE TO USE PREMISES OF ANOTHER—ASSUMPTION OF RISK—LIABILITY OF OWNER—STATUTORY OBLIGATION—STATUTE CONSTRUED—LIABILITY OF RAILROAD.—The case of *INDIANA, BLOOMINGTON & WESTERN R'Y CO. ET AL. V. BARNHART*, 115 Ind. 399 (*May Term, 1888*), was an appeal from a judgment for plaintiff in the Marion Superior Court for \$8,000. Barnhart was in the employ of the Cincinnati, Indianapolis, St. Louis & Chicago Railroad Company as a locomotive engineer and at the time of the injury was in charge of a switch engine pulling out of private grounds a "cut" of cars, and when he had reached a point about four feet north of the track of the Indiana, Bloomington & Western R'y Company his engine was run into by a car being backed up on another track by the servants of the Wabash, St. Louis & Pacific R'y Company. The action was commenced against five companies, but before it was submitted to a jury, it was dismissed as to all except the Indiana, B. & W. R'y Co., and the White River R. R. Co. There was verdict and judgment against both defendants. At the request of plaintiff the jury were, at Special Term, directed to return a *special verdict*, which they accordingly did, the same being set out in the opinion rendered in the Supreme Court by Niblack, J. The case is fully discussed in the opinion and judgment for plaintiff was *affirmed* and petition for rehearing overruled. The points decided are stated in the syllabus to the official report as follows:

"In a special verdict, all facts essential to a recovery must be found, to entitle the party having the burden of the issue to a judgment. Facts only are to be found, and conclusions of law contained therein must be disregarded. [The court cited *Vinton v. Baldwin*, 95 Ind. 433; *Pittsburgh, etc., R. Co. v. Spencer*, 98 Ind. 186; *Conner v. Citizens' Street R'y Co.*, 105 Ind. 62; *Pittsburgh, etc., R'y Co. v. Adams*, 105 Ind. 151.]

"Where a person has a license to go upon the grounds or the enclosure of another, or uses such grounds with the mere acquiescence of the owner, he takes the premises as he finds them, and accepts whatever perils he thereby incurs. [The court cited numerous American and English authorities on this point.]

"Where the owner or occupant of lands, by enticement, allurement or inducement, either express or implied, causes another to come upon such lands, he assumes the obligation of providing for the safety and protection of the person so coming, and becomes

liable for any breach of duty in that respect which causes injury to such person, in case such enticement, allurement or inducement amounts to an express or implied invitation, and an implied invitation may be inferred from some act or line of conduct, or from some designation or dedication. [Numerous authorities cited by the court on this point.]

"As a general rule, where an obligation is imposed by a statute, it is negligence *per se* to disregard the obligation thus imposed, and if the injury is thereby inflicted, the party disregarding the statute is liable. This rule has peculiar application to the management of railroads and railroad trains. [The court cited Wesley City Coal Co. *v.* Healer, 84 Ill. 126; Penn. Co. *v.* Hensil, 70 Ind. 569; Chicago, etc., R. Co. *v.* Boggs, 101 Ind. 522.]

"Under the provisions of sections 3904 and 3905, R. S., 1881, all railroad companies interested in railroad crossings are required to co-operate in maintaining and keeping such crossings in repair, and are jointly liable for an injury resulting from a neglect to observe such statute."

**EMPLOYEE CAUGHT BETWEEN CAR AND PLATFORM IN COAL MINE — LIABILITY OF MINE OWNER.** — In **KANSAS & TEXAS COAL CO. v. REED**, 1 Indian Territory, 245 (*June, 1897*), appeal from the United States Court in the Central District of the Indian Territory, where judgment was rendered for plaintiff for \$5,000, it appeared that plaintiff was employed in defendant's mine and was told by the superintendent to "run ahead and start the jigger engine," after a certain car had been pushed along one of the tracks in the mine, which plaintiff was assisting in pushing, and while running along the track to execute the superintendent's order, he stepped on a plank back of a platform and lost his balance, and in attempting to get on the platform his left foot was caught between a moving empty flat car and the platform and crushed. The case was tried at Cameron at the February Term, 1896, and the jury rendered a verdict for plaintiff for \$5,000. On appeal the verdict was held excessive, the evidence showing that the injury was not serious, nor such as to seriously interfere with plaintiff earning his living. The judgment was affirmed on remittitur of \$1,500.

**HOPKINSON v. KNAPP & SPAULDING COMPANY.***Supreme Court, Iowa, October, 1894.*

[Reported in 92 Iowa, 328.]

**MINOR EMPLOYEE KILLED BY FALLING DOWN ELEVATOR SHAFT — CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY.** — Where plaintiff's son, seventeen years of age, an employee in defendant's warehouse, fell into an elevator shaft on the third floor, having been sent from a lower floor to bring down some goods, and on returning the accident happened, being found below dead, the negligence charged being the permitting the elevator gate to be open and unfit for use, piling goods too near the gate, and in not lighting the way at or near the elevator, it was error to direct verdict for defendant, the question of contributory negligence being for the jury to determine.

**PARENT AND CHILD — DAMAGES.** — In an action by a parent for damages for death of his son, the fact that the deceased, by a temporary arrangement with his parent, used his earnings in his own support, would not defeat the right of the parent to recover his child's earnings in excess of the cost of supporting him (1).

I. *Injuries to minor employees — Machinery accidents.* — See the following cases relating to injuries sustained by employees of tender years:

*Injuries by saw machine.* — In SPRAGUE (BY NEXT FRIEND) *v.* S. & J. C. ATLEE, 81 Iowa, 1 (October Term, 1890), minor employee injured by saw machine in defendant's sawmill, judgment for plaintiff in the Superior Court of Keokuk, Lee county, for \$7,500 was affirmed. Paragraph 2 of the syllabus to the official report states the case as follows: "A boy of thirteen years of age, employed in a sawmill for the work of removing sawed materials from a steam saw, was directed by the boss or foreman of the establishment to operate such saw, in the absence of the usual operator, without giving him instructions as to the proper manner of operating the same, nor of changing the gauge thereof, and such direction was subsequently ratified by the common employer. While so employed the boy received orders to saw a particular kind of material, which, if obeyed, would not have ex-

posed him to the danger resulting in the injury received; but he refused to obey them. Subsequently he received different orders, which he obeyed; and afterwards, while engaged in changing the gauge of the saw, the boy, without fault on his part, received the injury therefrom upon which this action is based. Held, that in view of the subsequent change of orders, and his obedience thereto, the boy was not guilty of contributory negligence on account of his disobedience of orders previously received, nor because other methods of changing the gauge, which were beyond his strength, were less dangerous than the one adopted." Verdict for \$7,500 not excessive for loss of hand of employee whose expectancy of life is about 46 years. The opinion was rendered by ROBINSON, J.; and the counsel in the case were D. F. MILLER, SR., and CASEY & STEWART, for appellants; and JAMES C. DAVIS, for appellee.

In NEWBURY (BY NEXT FRIEND) *v.* THE GETCHEL & MARTIN LUMBER & MANUFACTURING CO., 100 Iowa, 441

APPEAL from the Woodbury District Court. The case is stated in the opinion. *Judgment reversed.*

F. E. GILL and LYNN & SULLIVAN, for appellant.

WRIGHT, HUBBARD & BEVINGTON, for appellee.

**Robinson, J.** — On January 2, 1891, Thomas W. Hopkinson, a son of the plaintiff, fell into an elevator of the defendant, and received injuries which caused his death within about half an hour. He does not appear to have spoken or to have been conscious after receiving the injury. He was seventeen years of age at the time, and had been in the employment of the defendant about four months. He worked with his brother Will on the second and third floors of the warehouse of the defendant, in handling and packing merchandise. The building is supplied with a freight elevator, which is operated from below to the third floor. The shaft is inclosed on that floor by a barrier about three and one-half feet in height. A part of the barrier consisted of a door or gate, which was hung with weights and cords, and was opened by raising and closed by lowering it. That afforded the means of passing into and out of the elevator. A gas-light fixture hung near the gate. The third floor was about 150 feet long and one-third as wide, and was well filled with merchandise, which in places was piled to the ceiling. Narrow spaces had been left for walks, which extended in various directions, one of which led past the elevator. At a little after five o'clock in the afternoon of the day of the accident, the deceased, who was then on the second floor, was told to go to the third floor, and bring

(December, 1896), boy, seventeen years of age, employed as a sort of "roustabout" in defendant's factory, put to work on a circular saw, called a "rip-saw" (upon which he had not been employed before), and while using the same his hand was injured, judgment for plaintiff in the Polk District Court was reversed for erroneous instruction on the rule as to assumption of risk as affecting a minor employee, etc.

**Liability for injury to servant of subcontractor.** — In *NEIMEYER v. WEYER-HAUESER & DENKMAN*, 95 Iowa, 497 (October, 1895), it was held (as per syllabus to the report) that "a mill owner who, retaining the charge of the running of the machinery in his mill, con-

tracts with another to do the manual labor, knowing that such person will have to employ others, will be liable for injury to any employee of such contractor, resulting from defects in the machinery." The plaintiff, a boy about thirteen years of age, was an employee in the shingle department of the defendant's sawmill, and while engaged in clearing away the shavings and dust from the saw his hand was caught and injured. He was employed by another who contracted with defendants to do certain work about the sawmill, but defendants retained control of the machinery. Judgment on verdict directed for defendants in the Scott District Court reversed.

down a dozen wire potato mashers. He ascended to the third floor by means of a stairway, obtained the mashers, and on his return fell into the elevator shaft onto the elevator, a distance of 25 or 30 feet, and received the injuries which caused his death. The plaintiff alleges that the accident was caused, without fault or negligence on the part of the decedent, by the negligence of the defendant in permitting the elevator gate to be and remain open and unfit for use, in piling goods too near the gate, and in piling them nearer to it than was customary, and in not lighting the way at or near the elevator.

The first three grounds of the motion to direct a verdict were that the evidence did not show negligence on the part of the defendant, that it failed to show that decedent was free from negligence, and that it shows affirmatively that he was guilty of contributory negligence. The appellee contends that these grounds are fully sustained by the evidence. There was evidence which tended to show facts substantially as follows: Employees of the defendant were not permitted to use the elevator excepting to raise and lower articles which they could not readily carry up or down stairs. The gate was habitually kept closed when the elevator was below it, and the decedent and his brother had been cautioned frequently not to leave it open at such times. A few minutes before the accident, Mr. Spalding, the vice-president of the defendant, and one or more customers, entered the elevator at the second floor, and ascended to the third floor for shovels. Just after they went up, the decedent went up, as has been stated. Mr. Spalding and his companions soon descended, and within three to five minutes thereafter the fall of the decedent occurred. There is some confusion in the evidence in regard to the condition of the gate, the goods near it, and the light; but the jury would have been fully authorized to find that the gate was open, and that it had been so left by Spalding; that the gas jet near it was not lighted; and the goods, consisting of tubs and other wooden ware, had been piled unusually near the gate during the afternoon. We are of the opinion that the evidence would have authorized the jury to find that the accident was due in part, if not wholly, to the negligence of the defendant. The testimony in regard to the alleged negligence of the decedent is not so direct and clear. It is shown that he might have obtained the mashers without passing by the elevator, but it was not necessarily dangerous to go near it. If the gate

had been closed, as it should have been, it is not probable that the accident would have occurred. The appellee claims that it was closed, for the reason that Spalding closed it, and that the decedent must have climbed over it to reach the cable and raise the elevator. Nothing in the evidence makes such an act on the part of the decedent at all probable. He could not have passed the barrier by climbing over it or opening the gate without considerable effort, and that he did not make it is shown to some extent by the fact that the mashers were in his hands when he was found in the elevator. It cannot be said that the jury might as readily have found that the gate was closed as that it was open at the time of the accident. It is not shown that any employee of the department used the elevator, or was near the gate, after Spalding left the third floor; and that fact and the further facts that but three, or at most five, minutes elapsed after Spalding descended before the deceased fell, and that the elevator was there where Spalding had left it, tend to show that the gate was left open by Spalding. The evidence also tends to show that the defendant had directed its employees not to light the gas near the gate unless it was necessary, that the decedent did not know that merchandise had been placed unusually near the gate, and that the way past the elevator was the shortest one by which he could reach his destination. It is true there is no affirmative evidence of due care on the part of the decedent to avoid the accident, and to enable the plaintiff to recover it must be shown that the decedent was free from negligence. *Patterson v. R. R. Co.*, 38 Iowa, 279; *Nelson v. R. R. Co.*, 38 Iowa, 566. Direct and positive evidence that the decedent did not, by his own negligence, contribute to the injury is not required. Where such evidence cannot be obtained, it is proper for the jury to consider the instincts of men, which naturally lead them to avoid danger, as evidence of due care on the part of the person injured. *Burns v. R. R. Co.*, 69 Iowa, 456; *Way v. R'y Co.*, 40 Iowa, 345; *Greenleaf v. R. R. Co.*, 29 Iowa, 48 (1). See also *Mayo v. R. R.*, 104 Mass. 140; *Strong v. City of Stevens Point (Wis.)*, 22 N. W. Rep. 428. There was conflict in the evidence in regard to some of the material facts in the case. We do not say that a preponderance of the evidence tends to show that they are as we have set them out, but only that the jury might have found

1. See the Iowa cases cited in the case at bar, reported with the Iowa cases in this volume, *post*.

to that effect. The deceased was familiar with the way in which the goods were stored on the third floor. He knew of the elevator shaft, and that the gate might be open, and the elevator be below, and he knew, if there was no light, that means for making one were at hand. He also knew that he could have returned to the second floor without going near the elevator. Whether, in view of these facts, and others which may be relevant, the plaintiff has failed to show that the deceased exercised reasonable care to avoid the accident, notwithstanding the inference which may be drawn in his favor, is not a question of law for the court, but one of fact, which should have been submitted to the jury. The case is not governed by the rule announced in *Meyer v. Houck*, 85 Iowa, 319.

2. The fourth and last ground of the motion for the court to direct a verdict was that the plaintiff had failed to show that he was damaged by the accident and the death of his son. At the time of his death the son was earning five dollars each week, but he had been living away from home about nine weeks and was paying \$3.50 a week for his board. The remainder of his earnings he used for his own purposes, the plaintiff not receiving any of them. But it is not shown that the arrangement was permanent, nor that the son had been emancipated. The plaintiff was entitled to his earnings, and was liable for his support. *Cooper v. McNamara*, 92 Iowa, 243; *Porter v. Powell*, 79 Iowa, 151. As a rule, his earnings were paid to the plaintiff, and the ordinary expense of supporting him was but two dollars per week. The plaintiff was entitled to recover his earnings in excess of the cost of supporting him. We conclude that the District Court erred in directing a verdict for defendant, and the judgment rendered is, therefore, reversed.

### WILSON v. THE DUNREATH RED-STONE QUARRY COMPANY.

*Supreme Court, Iowa, May Term, 1889.*

[Reported in 77 Iowa, 429.]

**DERAILMENT OF CAR ON INCLINE IN QUARRY—DEFECTIVE APPLIANCE—VICE-PRINCIPAL—FELLOW-SERVANT—ERRONEOUS INSTRUCTIONS.**—In an action to recover damages for injuries sustained by plaintiff, an employee in defendant's stone quarries, caused by breaking of an appliance attached to a car on which plaintiff was riding, running

on a tramway descending an incline down the quarry whereby the car was thrown from the track, it was alleged that the machinery and appliance was constructed and used under the direction of another employee, but there was no evidence that if the same was so constructed under his direction such employee had any authority in the matter. *Held*, that instructions to the effect that the said employee had authority to direct the use of the said machinery and appliances were erroneous.

**FELLOW-SERVANT.** — A master is not liable for damages sustained by an employee from the negligence of a co-employee, notwithstanding the latter was higher in authority than the one receiving the injury.

**DECLARATIONS — AGENT — FELLOW-SERVANT — EVIDENCE — *RES GESTÆ*.** — The declarations of an agent or employee, made at times far removed from the act to which they relate, are incompetent as evidence, not being part of the *res gestæ*.

**WARNING OF DANGER — KNOWLEDGE — EVIDENCE — CONTRIBUTORY NEGLIGENCE.** — Evidence tending to show that an employee was warned of the danger of getting on a car, and knew that it would be a perilous ride, was important as bearing upon the question of contributory negligence, and it was error to exclude same.

**APPEAL from Marion District Court. *Judgment reversed.***

"The defendant and appellant is a corporation engaged in quarrying and shipping stone from its quarries at Red Rock, in Marion county. E. W. Wilson, the plaintiff, was employed by the defendant as a laborer in said quarries about December 1, 1886. The defendant undertook the construction of a double tramway down an incline for the purpose of running cars thereon to carry off strippings and other refuse from the quarry down in the direction of the Des Moines river, where it was to be dumped from the cars. The intention was to construct the double tramway so that, as one loaded car would be going down another empty one would ascend the incline. Before the work of constructing the tramway was completed, one Stuart, who was superintendent of the quarry, went away temporarily. During his absence the force of men at work in the quarries rigged up a tackle and snatch-block fastened to a tree to let down loaded cars. An attempt was made to let down two loaded cars at one time by this means. The plaintiff and one Staley were at or near the top of the incline, and just before the attempt was made to let the cars down, one Horner, another employee, who was below, called to plaintiff to go on top of the hill and get a scraper. The evidence is in conflict as to what Horner directed the plaintiff to do with the scraper. The plaintiff claims that he was directed "to go on top of the hill and get the scraper, put it on the car, and come down." Other witnesses testified

that Horner directed the plaintiff to throw the scraper down over the bluff. The plaintiff brought the scraper to the upper end of the tramway, put it on one of the cars, and he and Staley got on the cars and commenced to make the descent. When the weight of the cars came upon the tackle, rigged and fastened to the tree, the pin in the snatch-block broke, the cars descended the incline at great speed, which resulted in their jumping from the track, and greatly injuring the plaintiff. The action is founded upon the alleged negligence of the defendant in using defective and dangerous machinery and appliances, by reason of which the plaintiff was injured. The defendant, by its answer, denied that any defective machinery or appliances were in use by its orders, and alleged that the plaintiff was chargeable with contributory negligence. There was a trial by jury, which resulted in a verdict and judgment for the plaintiff. Defendant appeals."

C. H. ROBINSON, STONE & GAMBLE and KAUFMAN & GUERNSEY for appellant.

HAYS BROS., for appellee.

**Rothrock, J.—I.** It is conceded that the accident happened by reason of the breaking of the pin in the snatch-block, and that the pin was defective in that it was so much worn as to be insufficient to withstand the weight of the descending cars. One of the main points in controversy is whether the snatch-block and rigging were put in position under the orders of any one who stood in the relation of vice-principal to the defendant. The plaintiff claims that Horner, the man who directed the scraper to be brought or thrown down, stood in the place of the company, and that he directed the construction of the appliance which caused the injury. On the other hand, the defendant insists that Horner was a mere laborer, and engaged in the same general service with the plaintiff. There is no dispute that Stuart was the superintendent of the quarries, and that one Washer was the foreman under Stuart. But Horner was an employee who worked wherever he was directed. He had charge of the tools, and kept the time of the men. It is true that at times he may have given direction to some of the employees in regard to the work at which they were engaged. But there is no evidence that he had any authority at any time to direct the construction of machinery, or to purchase tools, or make selection of appliances to be used to facilitate the work. In such case, even if it be conceded that he was foreman of the gang of

laborers in the absence of Stuart and Washer, he was nevertheless a fellow-servant, and his principal is not liable for damages sustained by an employee, from the negligence of a co-employee, notwithstanding he was higher in authority than the one receiving the injury. *Sullivan v. R'y Co.*, 11 Iowa, 421; *Peterson v. Mining Co.*, 50 Iowa, 673; *Troughear v. Coal Co.*, 62 Iowa, 576; *Foley v. R'y Co.*, 64 Iowa, 644 (1). And see *Wood Mast. & Serv.*, § 425.

As we have said, it is not claimed that the defective snatch-block was put in position for use by the direction of the superintendent, nor by Washer. It is claimed, however, that, as both were absent, Horner acted in the place of the superintendent, or, in other words, acted as and for the defendant, and that the snatch-block was used by his direction. And the jury all through the instructions given to them by the court were charged upon the theory that there was evidence from which such a finding could be made. We do not think these instructions were proper under the evidence, in view of the repeated decisions of this court as to the law applicable to cases of this character. The seventeenth paragraph of the charge to the jury is as follows: "It was the duty of the defendant to exercise reasonable care and prudence to protect the men who were employed by and working for it from injury; and if an injury to one of their employees resulted from the carelessness of the defendant's superintendent, or their servant, having control, direction and management of its business, machinery and appliances, then the company is liable unless the person so injured has contributed to said injury by his own negligence." It is enough to say of this instruction that it is erroneous, because there is no evidence that Horner had authority to direct what machinery or appliances should be used. He neither had the authority of selecting, nor the power to put machinery in place. And we may say further that there is no sufficient evidence that Horner had any agency whatever, in fact, in putting the defective snatch-block in use.

II. Certain witnesses were allowed to testify to declarations and statements made by Horner relating to the snatch-block and its use. These statements were made before and after the accident, and were in no sense a part of the *res gestæ*. This evidence was objected to by defendant, and the objections were overruled.

1. The cases cited in the opinion in the case at bar are reported with the Iowa cases in this volume, *post*.

The evidence was improper. The declarations or admissions of an agent or employee, made at times far removed from the act to which they relate, are incompetent as evidence. *Lucas v. Barrett*, 1 G. Greene, 510; *Verry v. R'y Co.*, 47 Iowa, 549; *Treadway v. R'y Co.*, 40 Iowa, 526; *Hakes v. Myrick*, 69 Iowa, 189. There are many objections made to the several parts of the charge given by the court to the jury, which we do not deem it necessary to determine. As we have said, all of the instructions are based upon the idea that there was evidence from which the jury might find that Horner was a vice-principal, and represented the company as such. We think there is no such evidence, and the instructions were therefore erroneous.

III. Much of the argument of counsel for appellant is to the effect that the court erred in not sustaining a motion in arrest of judgment based upon a variance between the averment of the petition and the evidence introduced upon the trial. We need not determine this question. An amendment to the petition was filed, by which it is claimed the alleged defect was cured. There is a dispute between the parties whether the amendment was filed within the time and with leave of the court. We need not determine this question. It will not arise upon a new trial.

IV. In view of a new trial it is proper that we should briefly notice one other alleged error. It is a disputed fact in the case whether the plaintiff was directed by any one to ride down the tramway on one of the cars, and whether he was warned by the bystanders that the ride would be dangerous. In the cross-examination of the plaintiff as a witness the following questions were propounded to him by the defendant's counsel: "I will ask you if you were not warned by more than one of your co-employees that it was dangerous to ride down on the car?" and "I will ask you if you did not, when you got into that car, know or have reason to know that it was a dangerous trip to make — a dangerous ride?" Objections to these questions were sustained. The objections should have been overruled. If the plaintiff was warned of the danger, and knew that it was a perilous ride, these facts would have been an important consideration, as bearing upon the question of contributory negligence. We refer to this because more than one witness testified that the plaintiff was warned not to ride down on the car, and one of these witnesses stated that the plaintiff "said he was going to ride down or break his damned neck."

For the errors above pointed out the judgment will be reversed.

**LUMLEY v. CASWELL.***Supreme Court, Iowa, December Term, 1877.*

[Reported in 47 Iowa, 159.]

**EXPLOSION OF BOILER OF STEAM ENGINE — EMPLOYEE'S KNOWLEDGE OF DEFECTS — CONTRIBUTORY NEGLIGENCE.** — Where an employee, an engineer running a steam engine, was injured by the explosion of the boiler, caused by alleged defective condition of the boiler and pumps, and it appeared that he had knowledge of the defects and continued to remain in defendant's employment, and it was not shown that there was any promise to repair on the part of the defendant, it was held that he could not recover and judgment for plaintiff was reversed.

**RULE AS TO CONTINUING IN SERVICE AFTER KNOWLEDGE OF DEFECTIVE MACHINERY.** — The general rule as to the knowledge of defects by an employee was applied, as follows: "If the defects of the machinery used are known to the employee, or are discoverable by him in the exercise of ordinary care, and he remains in the employment without protest, and without inducement by promise that the defects shall be remedied, he will be presumed, in the absence of evidence to the contrary, to have waived his objections to the defects."

APPEAL from Boone District Court. *Judgment reversed.*

"Action to recover for personal injuries. The plaintiff while employed by the defendant in running a steam engine was injured by the explosion of the boiler.. He avers that the boiler and pumps connected therewith were defective and that the defendant was guilty of negligence in using such boiler and pumps. The defendant denies all knowledge upon his part, and avers that the plaintiff had full knowledge of the condition of the boiler and pumps, and that the explosion was caused by the plaintiff's negligence. Other facts are stated in the opinion. Judgment for plaintiff. Defendant appeals."

RITCHEY & GREEN and J. W. BARNHART, for appellant.

HULL & RAMSEY, for appellee.

**Adams, J.** — There was evidence tending to show that the plaintiff at the time of the explosion had knowledge of the defective condition of the boiler and pumps. One Pugsley testified that a short time after the explosion the plaintiff told him that he had condemned the boiler before it exploded. The plaintiff himself testified that the cold water pump was old; that at times it would pump enough to supply the boiler and more times it did not. He also said: "I was free at all times to examine and know the condition of these pumps and had the

privilege of doing so. I never looked at them. I had no interest in them. I didn't want to. I think I told Pugsley about two weeks before this explosion that the boiler was a condemned one. But won't be sure that I did or did not. I am not positive that I did not tell Pugsley at the same time that I had condemned the boiler." There was also evidence tending to show recklessness on the part of the plaintiff. The witness, Pugsley, testified that about ten days before the explosion the plaintiff told him that he intended to blow the boiler to hell before he left.

An instruction asked by the defendant, and refused by the court, is in these words: "If the plaintiff had the same knowledge or means of knowledge of the defects or deficiencies or imperfections in the boiler or machinery which the defendant had, and remained in his employ without protesting or objecting, he cannot recover for an injury caused by such defects, deficiencies or imperfections, but will be held to have incurred all the risks of the employment incident to the use of such defective, deficient or imperfect machinery." In refusing to give this instruction we think that the District Court erred.

The instruction, it is true, would have been erroneous if there had been any evidence tending to show that the plaintiff remained in the defendant's employment under a promise on the part of the defendant that the defects should be remedied. *Greenleaf v. Ill. Cent. R. Co.*, 29 Iowa, 14 (1); *Clarke v. Holmes*, 7 H. & N. 937 (2). It is also true that while the abstract does not show any evidence of such a promise it does not purport to contain all the evidence. But we think we are justified in assuming that there was no evidence of such promise. An instruction was given by the court which would have been incorrect if there had been such evidence. That instruction is in these words: "If the plaintiff had the means of knowledge that the defendant had as to the condition of the boiler and other machinery, and having knowledge of the defects or unsafe or unsound condition of the

1. The GREENLEAF case is reported with the Iowa cases in this volume of *AM. NEG. CAS., post.* broken by accident. The plaintiff complained of the dangerous state of the machinery, and the defendant promised him that the fencing should be restored.

2. In *Clarke v. Holmes*, 7 H. & N. 937, it appeared that plaintiff was employed by defendant to oil dangerous machinery. At the time the plaintiff entered upon the service the machinery was fenced, but the fencing became

The plaintiff, without any negligence on his part, was injured in consequence of the machinery remaining unfenced. Held, that the defendant was liable for the injury. Affirming *Holmes v. Clarke*, 6 H. & N. 349.

boiler and other machinery, does not object or protest against the continuance of such defects or unsafe or unsound condition of the boiler and other machinery or materials, but remains after such knowledge in the employ of the defendant, he thereby contributes by his own neglect to such damage and cannot recover." Such being the idea of the court, we cannot suppose that the instruction asked by the defendant was refused upon the ground that it was not qualified by the condition that the plaintiff was not induced to remain in the defendant's employment by a promise that the defects should be remedied. It is probable, indeed, that the instruction given was designed to embrace substantially the doctrine of the instruction refused. But it failed to do so by an infelicity in its structure. The plaintiff's negligence was made to depend upon his remaining in the employment with the same means of knowledge, *and* the knowledge, of the defects. The court evidently used the word *and* where it intended to use the word *or*. This appears from the fact that if plaintiff had the knowledge he had necessarily the means of knowledge. Now it was the defendant's right to have the jury instructed that if the plaintiff had either, and remained without protest, he would be unable to recover.

While we think that the instruction asked by the defendant should have been given, we do not hold it to be correct as a general proposition, but merely in its application to this case. The plaintiff was an engineer. If there were such defects in the boiler or pumps as to cause an explosion it was as much his duty to use the means in his power to discover them as it was the duty of the defendant to use the same means. But we are not prepared to say that a person might not be employed under such circumstances, or sustain such relation to his employer, that a more rigid duty would be imposed upon the employer than upon the employed to use such means as were within the reach of both to discover defects in the machinery used. The rule of general application undoubtedly is that if the defects of the machinery used are known to the employee, or are discoverable by him in the exercise of ordinary care, and he remains in the employment without protest and without inducement by promise that the defects shall be remedied, he will be presumed, in the absence of evidence to the contrary, to have waived his objections to the defects.

Judgment reversed.

**COUCH v. WATSON COAL COMPANY.***Supreme Court, Iowa, June Term, 1877.*

[Reported in 46 Iowa, 17.]

**MINER STRUCK BY DRILL FALLING FROM HOISTING CAGE — IN-COMPETENT ENGINEER — EVIDENCE.** — In an action to recover damages for injuries sustained by a miner who was struck and injured by the fall of a drill which he had placed in a hoisting cage, the negligence charged being the incompetency of the engineer in charge of the steam engine used in operating the cages, the fact that the engineer was discharged by defendant after the accident and also by a subsequent employer did not tend to prove his incompetency, and it was error to admit evidence thereon.

**CUSTOM — EVIDENCE.** — Before a custom can affect the rights of parties, it must be so general that a knowledge thereof by them may be presumed.

**WITNESS — EXPERT.** — A superintendent of a coal company may state his opinion as to whether an engineer employed in the company's mine was a careful and prudent man, without qualifying as an expert.

**DEFECTIVE CAGE — NOTICE — QUESTION FOR JURY.** — A plaintiff may introduce his evidence as he deems proper, and, in this case, he had the right to prove in the first instance that there were no covers on the cages; if it was subsequently shown that he had knowledge of such defects, it was a question for the jury to consider under instructions of the court.

**NEGLIGENCE OF EMPLOYEE — EVIDENCE.** — Evidence as to specific acts of negligence on the part of an alleged incompetent servant is admissible as tending to show negligence on master's part of continuing to employ him, but it should not be admitted unless it was shown that such acts occurred before the accident complained of.

**APPEAL from Polk Circuit Court. Judgment for plaintiff reversed.**

"The plaintiff is a miner, and was employed by the defendant as such in its mines, and while in such employment received a severe bodily injury, and this action was brought to recover damages thereby sustained. The grounds upon which the plaintiff seeks to recover are stated in the charge of the court to the jury, as follows:

"1. The plaintiff seeks to recover in this action upon the alleged ground that at the time of the injury the engineer was incompetent and reckless, and that by reason of such incompetency and recklessness the plaintiff was injured, without fault or negligence on his part.

"2. Another cause for the alleged recovery in this action is, that the cages and platforms were defective, and not properly constructed, and that by reason of such alleged defects the injury was caused without the negligence of the plaintiff."

"The evidence tended to show that the mine of defendant was operated by means of a shaft some fifty or sixty feet deep, and that the cages were used for the purpose of hoisting coal, the miners and their tools, when the latter needed repairing. The power consisted of a steam engine and the necessary machinery.

"On the day of the accident the plaintiff desired to go up the shaft, and also to send up some drills to be repaired. He placed one drill in the cage that was hoisted up, and did not go himself in that cage because he was forbidden to do so by some one in authority, but remained below intending to go up in the descending cage after it should reach the bottom and return on the next upward trip. When this cage reached the bottom of the shaft the plaintiff stepped thereon for the above purpose, and while standing there was struck and injured by the falling of the drill he had placed in the other cage.

"There was a jury trial. Verdict and judgment for the plaintiff, and defendant appeals."

PARSONS & LEWIS, for appellant.

B. A. WILLIAMS and E. J. GOODE, for appellee.

**Seavers, J.**—I. The engineer's name was Brothers, and Brown was defendant's superintendent. The plaintiff, on cross-examination of the latter, was permitted to prove by him that defendant had discharged Brothers, and that he had afterward been employed as engineer at Redhead's coal mine and had been discharged therefrom, and also what Redhead had said was the cause of such discharge. The defendant made timely and proper objections to the admission of this evidence, and the same being overruled exceptions were taken thereto.

The only object and purpose of the evidence was to show that Brothers was an incompetent engineer, and we think it had no tendency to prove such fact. The fact that he was discharged after the accident in no way tended to prove him a careless and incompetent engineer. He may have been discharged for a variety of reasons. It was not legitimate or proper to draw such a deduction from the fact of his discharge. Even the time of such discharge is not shown; whether it occurred immediately after, or in consequence of the accident, or at a remote period thereafter, does not appear. A somewhat similar question, in principle, was determined by us in *Campbell v. Chicago, R. I. & P. R. Co.*, 45 Iowa, 76.

Much more objectionable was the admission of what occurred at Redhead's mine, and what the latter said in relation to the discharge of Brothers by Redhead. The occurrence at Redhead's was after this accident, and what he said was the cause of the discharge of Brothers was hearsay, and could have no tendency to prove any issue in the case.

II. The principal, if not the only, defect in the machinery consisted in the fact that there was no bonnet or covering to the cages; the probable effect of such would be to protect persons on such cages from being injured by any substance that might accidentally or otherwise fall from the mouth of the shaft. As tending to show that the cages were improperly constructed, and not adapted to the purpose for which they were used, and as tending to show that defendant was guilty of negligence in constructing and using such machinery, the plaintiff introduced as a witness one Reese, and proved by him that he had worked as a miner in the coal mines for many years in Wales and Pennsylvania where steam machinery was used, and thereupon asked him: "What was the custom, or how was the machinery constructed — how were the cages constructed as to bonnets?" To this question defendant properly objected, but being overruled the witness replied: "I only worked in one shaft." The plaintiff then asked: "How was that as to bonnets?" To this the defendant again objected but was overruled, and the witness replied: "Well, there was what we called bonnets or covers there in that one shaft." Conceding that it be proper to prove such a custom for the purpose of showing the cages used in this mine were improperly constructed, still we think this evidence was improperly admitted. Before a custom can affect the rights of parties, it must be so general that a knowledge thereof by them may be presumed. For instance, before the defendant could be deemed guilty of negligence in the construction or use of the cages, the custom under which it was sought to make it liable should be so general that the defendant could be presumed to have knowledge of its existence. 2 Parsons on Contracts, 241, note. The fact that bonnets were used in one mine in Pennsylvania or Wales had no tendency to prove the existence of such a custom there, much less here. Besides, mines, of necessity, must be of various depths, and what would be proper machinery for one might not be for another. What is customary in Pennsylvania may not be so here. If it had been shown that operators

of mines in this State similarly situated, and using substantially the same kind of machinery, generally constructed cages with bonnets, it could be reasonably presumed that defendant had knowledge of such custom, and the failure to do what was usual and generally done by others in a similar business and under similar circumstances would have a tendency to show that these cages were improperly and negligently constructed.

III. The defendant asked Brown, its superintendent, " You may state whether Mr. Brothers was a careful, competent and prudent engineer," and in substance asked Mr. Yeomans, by whom Brothers had been employed, the same question. The court sustained plaintiff's objections to these questions. We do not believe these witnesses showed themselves competent to testify to the facts desired to be elicited, under the rule laid down in *Pelamourges v. Clark*, 9 Iowa, 1. Neither of these persons were practical engineers. They did not belong to the guild, trade or profession, nor did they pretend to have the requisite knowledge.

But it is insisted that Mr. Brown should have been permitted to answer the question, because the tendency would have been to show that defendant was not negligent in employing the engineer or continuing him in its employment. It is not the company but its officers having charge of this department of their business that is expected to use ordinary care in the employment of engineers and other employees. His carelessness and knowledge in this respect are the carelessness and knowledge of the company. We therefore think it was material and important that Mr. Brown should have been permitted to state whether or not Brothers, in his opinion, was a careful and prudent engineer, subject to the right of cross-examination as to his means of knowledge. It seems to us this was the very gist of the inquiry. It matters not whether Brown was an expert or not, but because it was claimed he had been guilty of negligence in continuing a careless and incompetent engineer in the employment of the company. This view is expressly sustained by *Frazier v. Penn. R. Co.*, 38 Pa. St. 104.

IV. The witness Stahlgren was asked on cross-examination by defendant certain questions, which were designed to elicit the fact that the drill could not be placed in certain designated positions in the cage. Objection to these questions was sustained on the ground that it was not proper cross-examination. In this

ruling there was no error. However material the proposed evidence may have been, it was not proper to elicit it on cross-examination of this witness.

V. The plaintiff asked, when on the stand as a witness, whether the cages had any covers on them. An objection by the defendant was overruled, and counsel claim the admission of the response to the question presented a false and immaterial issue, for the reason that the plaintiff knew the condition of the cages during the time he worked for defendant, which was for some time previous to the accident. In this view we do not concur. The plaintiff must be permitted to introduce his evidence as he deems proper. He, therefore, had the right to prove in the first instance there were no covers on the cages, and if it was subsequently shown that plaintiff had knowledge of such defects, if such they were, this was a matter for the consideration of the jury under the instructions of the court.

VI. The plaintiff proved by one, Gould, that he worked in the mine and was at the mouth of the shaft every time he passed up and down, and thereupon asked him: "Have you noticed, or did you notice, the manner in which the cages were raised up above the caps and landed?" The defendant made timely and proper objections to this question, but the same were overruled, and the witness answered: "I had noticed how the cages were landed when Brothers was there. They were sometimes hoisted up so they landed very carefully, and at other times they were hoisted a foot or a foot and a half. I think I have seen them hoisted as high as two feet." The defendant again objected to this evidence, because it was not shown that the matters testified to by the witness took place prior to the accident. Whereupon the court asked the witness: "Was this prior to the accident?" And the reply was: "I could not swear it was, positively. There was a change of engineers frequently about that time, or just before they had a green hand. I could not tell the exact date." Exceptions were taken to the admission of the foregoing evidence, and the witness said in response to another question asked by the court: " \* \* \* I could not tell or set any particular day; whether it was just before or immediately after; it was a common occurrence that the cages were hoisted higher than was necessary to land them."

It is claimed on the one hand, and not denied on the other, that the raising of the cages so high above the platform tended

to show that the machinery was defective and unmanageable, or that the engineer was careless and incompetent. It is insisted that particular acts of negligence are not admissible as evidence for the purpose of showing the incompetency of the engineer, and this view is sustained by *Frazier v. Penn. R. Co.*, 38 Pa. St. 104. We deem it unnecessary to determine this question, for if the evidence was admissible for any purpose then there was no error in admitting it.

A somewhat different view from the rule established in Pennsylvania was taken in Pittsb., Ft. W. & C. R. Co. *v. Ruby*, 38 Ind. 294, 14 Am. Neg. Cas. 503, *ante*, and such evidence held admissible. But in an opinion delivered after a petition for a rehearing had been filed, it is stated that the evidence was admitted on the *sole* ground that the master of transportation of plaintiff in error was present on an occasion when one of the alleged specific acts of negligence occurred. And it is further said, "that such evidence must relate, we think, to a time prior to that at which the plaintiff received the injury. That which had not yet happened could be no notice to anyone." As thus limited there is no conflict between these cases, for the reason that *Frazier v. Penn. R. Co.*, *supra*, does not determine what the rule should be if the defendant, or any of its principal officers, had knowledge of such specific acts. The Indiana case is based, it seems to us, on the correct theory that before the plaintiff can recover on the ground of negligence on the part of the engineer in the case at bar, he must establish: 1. That the accident was caused by such carelessness and negligence; and, 2, that the defendant employed him, or continued him therein, after it had reasonable knowledge of his carelessness and negligence, and that knowledge on the part of the superintendent constitutes notice to the defendant.

However it may be as to other corporations, we have no doubt under the testimony that the defendant should be held bound by the knowledge of its superintendent. He had full charge of the mines. It was his duty to see that the employees performed their several duties in a careful and prudent manner. There was but a single mine and but one hoisting apparatus and engineer. The superintendent had the opportunity of personally observing how the engineer performed his duty. As the plaintiff must establish negligence on the part of the defendant in employing, or continuing to employ, the alleged negligent engineer, we

think the evidence was admissible for this purpose, but that the defendant cannot be held liable or chargeable with knowledge thereof unless it can be satisfactorily shown that its superintendent had knowledge of such specific acts of negligence. Nor do we believe that evidence of actual knowledge is necessary, but it may be inferred from circumstances.

If the superintendent, as a reasonably careful and prudent man, must have had knowledge of these specific acts, then the defendant is bound thereby. It must be supposed the superintendent performed his duty and was reasonably watchful. If the acts of negligence were numerous, he would be the more likely to know of them than if they were not so numerous or consisted of but a single act. This would necessarily be a question for the jury under proper instruction of the court. We think there was evidence tending to show that the superintendent had knowledge, or as a reasonably careful and prudent man must have known of the alleged specific acts of negligence testified to by Gould, and that therefore, so far, there was no error in the admission of the evidence. But we feel constrained to say that the evidence should not have been admitted, because it was not shown that the specific acts of negligence occurred before the accident. If it cannot be shown to the satisfaction of the court that the acts of negligence occurred prior to the accident the evidence should be rejected, and this should be the rule if it is left in doubt. If, however, the witness is able to state the facts and circumstances from which the ultimate fact can be determined, the question should be submitted to the jury under proper instructions.

VII. It is insisted, with much earnestness and ability, that the court should have directed a verdict for the defendant, and that the evidence fails to sustain the verdict. Under the rulings herein made, it is hardly probable the evidence will be the same on the next trial, and, therefore, we deem it unnecessary to determine these questions.

VIII. The length of this opinion forbids that we should examine the instructions objected to in detail. It is sufficient to say that in the main we deem them correct. They, however, should be so modified on the next trial as to present the grounds of defendant's liability in respect to the engineer, so as to present fairly the question as to defendant's knowledge of his incompetency as herein indicated.

Judgment reversed.

**Notes of Iowa cases arising out of accidents in mines.**

*Employees injured by falling objects — Roof of mine.*

In *FOSBURGH, ADM'X v. PHILLIPS FUEL CO.*, 93 Iowa, 54 (October, 1894), miner killed in defendant's mine by the falling of slate from the roof of one of the entries in the mine, judgment for plaintiff in the Wapello District Court was reversed. The negligence charged was that of a roof repairer whom it was claimed was a vice-principal, but it was held that the roof repairer, who was a laborer sent to do the work by the pit boss, was a fellow-servant of the deceased, and defendant was not liable.

In *MONEY v. LOWER VEIN COAL CO.*, 55 Iowa, 671 (June Term, 1881), miner injured by fall of rock from the roof of an entry in defendant's coal mine, judgment for plaintiff in the Boone District Court for \$800 was reversed for erroneous instructions as to liability in respect to knowledge of danger. "The true rule is that if the plaintiff knew, or by the exercise of ordinary care might have known, of the unsafe condition of the roof, and he continued to work in the dangerous place without protest or complaint, and without being induced to believe that a change would be made, he assumed the risk and cannot recover."

In *WRIGHT v. RAWSON*, 52 Iowa, 329 (December Term, 1879), employee in coal mine, visiting another employee, fatally injured by fall of roof, demurrer to plaintiff's petition was sustained, and judgment thereon in the Polk Circuit Court was affirmed. The court (per BECK, Ch. J.) said: "In order to establish liability of defendant it must be made to appear that the intestate was in defendant's employment and in the proper discharge of his duty, and that he did not voluntarily seek a place of danger. It cannot be claimed that defendant would be liable if the intestate had been a visitor to the mines, or had left his proper place and sought the dangerous room without thereby serving defendant or discharging any duty of his employment. When the accident happened it clearly appears that the intestate was not engaged in mining, which was his employment; that his proper place was not in the room where he was injured, but, on the contrary, he was a visitor there for his own pleasure or amusement. The intestate, not being engaged in his employment, was in the same position of a visitor to the mine. As an employee, having voluntarily put himself in danger, he cannot recover. *Doggett v. Ill. Cent. R. R. Co.*, 34 Iowa, 284. The custom of miners to visit their fellow-workmen, and the acquiescence of the defendant in such custom, cannot be regarded as an invitation for the workmen to leave their proper places and frequent dangerous parts of the mine at the risk of defendant." \* \* \*

In *PETERSON v. THE WHITEBREAST COAL & MINING COMPANY*, 50 Iowa, 673 (June Term, 1879), it was held that "the principal is not liable for damages sustained by an employee from the negligence of a co-employee in the same general service, notwithstanding such co-employee is higher in authority than the one receiving the injury." Following the rule in *Sullivan v. M. & M. R. R. Co.*, 11 Iowa, 421 (but the rule there laid down, as to railway corporations, has been changed by statute).

In the PETERSON case it was alleged that plaintiff was an employee of the defendant coal company and was injured by the negligence of a boss or foreman of defendant. Demurrer to the complaint was sustained, and was affirmed in the Supreme Court.

In *TROUGHEAR v. LOWER VEIN COAL CO.*, 62 Iowa, 576 (December Term, 1883), miner injured by fall of rock from roof of mine, the case of *Peterson v. Whitebreast Coal & Mining Co.*, 50 Iowa, 673, was followed, where it was held that

the principal was not liable for injuries received by an employee through the negligence of a co-employee. Judgment for plaintiff in the Boone Circuit Court was reversed for erroneous instructions.

*Employees in mines injured by cars.*

In *HEATH v. WHITEBREAST COAL & MINING CO.*, 65 Iowa, 737 (April Term, 1885), employee, engaged as driver in defendant's mine, injured by cars which struck the cars he was driving, judgment for plaintiff in the Lucas Circuit Court was reversed. The fact that a switch-track in a coal mine was built upon a grade is not of itself presumptive evidence of negligence in building, as there may not have been another way to build it, and an instruction on this point was erroneous. A special finding contrary to evidence ground for new trial.

In *CRABELL, ADM'R v. WAPELLO COAL CO.*, 68 Iowa, 751 (April Term, 1886), plaintiff's intestate killed while riding on front end of a coal car in a mining train of which he was conductor, judgment for plaintiff in the Wapello District Court was affirmed.

In *BECKMAN, ADM'R, v. CONSOLIDATION COAL CO.*, 90 Iowa, 252 (January, 1894), employee, in defendant's mine, struck and run upon by a loaded car and killed, a switch, which it was the duty of the deceased to keep closed, being open at the time of the accident, causing the car to run in on the empty track, judgment on verdict directed for defendant in the Mahaska District Court was affirmed. It appeared that the deceased had been employed in the mine for a year and a half, was familiar with the switch, etc., knew the custom of pushing loaded cars, etc. The court held that deceased assumed the risk.

*Falling to bottom of coal shaft — Defective appliance.*

In *MORAN v. HARRIS ET AL.*, 63 Iowa, 390 (April Term, 1884), miner working in defendant's coal shaft injured by fall of a tub precipitating him to bottom of the shaft, defective appliances being alleged as the cause of the accident, judgment of the Webster District Court setting aside the general verdict for plaintiff, overruling defendant's motion for judgment on the special findings, and granting a new trial, was affirmed. The appeal was by both parties.

**ENGINEER, OPERATING TRACTION ENGINE USED IN MOVING THRESHING MACHINE, KILLED WHILE ASSISTING AGENT IN MOVING MACHINE — DIRECTION OF VERDICT FOR DEFENDANT.** — In *HIRSCHL., ADM'R., v. CASE THRESHING MACHINE CO.*, 85 Iowa, 451 (May, 1892), plaintiff's intestate killed while assisting in operating a traction steam engine, the motive power for a threshing machine, judgment on verdict directed for defendant in the Cedar District Court was affirmed. The facts are stated in the opinion by ROTHROCK, J., as follows:

"The main question involved in the appeal is: Did the court err in directing a verdict on the ground that the evidence was insufficient to authorize the jury to return a verdict for the plaintiff? A determination of this question requires an examination of the evidence which the plaintiff introduced to sustain his cause of action. It appears from the evidence that the partnership of Kinnan & Fevis purchased a steam threshing machine of the defendant. The

contract of purchase was made with one Julius Freund, who was the defendant's agent at the village of Lowden, in Cedar county. Oliver Kinnan, one of the purchasers of the machine, went to Lowden and settled for the machine before it was removed from the place. When the order for the machine was given, it was arranged that the defendant was to send a man to Lowden to run the machine out to Kinnan's place, and to stay three or four days and show how to run it. A man named Wilson came to Lowden for that purpose, and Kinnan met him there. The engine and machine were started on the road to Kinnan's place. The distance was from six to seven miles. Wilson took charge of the running of the engine, and proceeded on the way, about three and one-half miles, and it being in the evening, it was stopped because of the approach of night. This was on Saturday. As we understand the evidence, the machine was left there until Sunday afternoon, when it was again moved on toward Kinnan's place. Kinnan had hired Maurer to run the engine for him in threshing, and he met with Wilson, Kinnan and others to move it on to Kinnan's place. Maurer had experience as an engineer of stationary engines, but had not been employed in running a traction engine. When these persons met, Maurer was introduced to Wilson, and the machine was started on its way; and while on the road it was run upon a bridge, which broke down, and Maurer was killed by being crushed between the guide wheel and the tender.

"Kinnan was examined as a witness for the plaintiff, and testified, in part, as follows: 'I introduced Maurer to Wilson as being the engineer I had employed to run the machine, and Wilson went on and explained to him the use of the engine, the use of the machine, the governor, the throttle and the guide wheel. I think he went all over the machine. Am not positive about his directing him how to oil it. I didn't pay much attention to what he was doing. He showed him about the machine, but what it was I couldn't say now. We had not commenced firing up before Wilson got there. When we left there Maurer was running the engine. He took it in charge there to run it, and run it all the way until it went into the bridge. So far as I saw, I saw they were looking out, and Wilson was attending to the firing, and Maurer was standing at the guide wheel. It is the business of the man at the guide wheel to know the condition of the road ahead, and to run and guide the machine and stop and start it. A man of Wilson's height, when standing on the foot-board and firing, cannot see the road ahead.' He further testified as follows: 'I am familiar with the engine and the running of it now. I and Mr. Haney run it. Standing where Wilson was putting

in fire he cannot see the road. He would have to get to the place where the engineer is standing at the guide wheel.' There is other evidence to the effect that Wilson was running the engine, but, when explained by the witnesses, it does not conflict with the testimony of Kinnan that Wilson could not see the road from his position on the engine. All of the evidence shows that Maurer was at the guide wheel from the time the engine started until the wreck occurred, and that, if anyone could see that a bridge was to be crossed, it was Maurer. No jury would be warranted in finding that Wilson could have seen the bridge from his position on the engine. This being the state of the record, it is manifest that the court rightly directed a verdict for the defendant. Counsel for the plaintiff contends that there is some evidence that Wilson knew that a bridge was to be crossed, because he had passed over the road on the same day and the day before; and that the shades of night were coming on when the wreck occurred, and Maurer could not see the bridge ahead of the engine. The evidence does not show that it was so dark that the bridge could not have been seen by Maurer in time to have stopped the engine. And there is nothing in the case to show that Maurer was not familiar with the road. Complaint is made because the plaintiff was not permitted to introduce expert evidence as to the number of men necessary to run the engine. Such evidence would not have raised a conflict with the fact that stands out all through the case, that Maurer was giving direction to the engine, and was at the point of lookout for obstructions in the road." \* \* \* (HEINZ & HIRSCHL and WOLF & HAMLEY, appeared for appellant; CRAIG, McCRARY & CRAIG, WHEELER & MOFFIT and N. M. HUBBARD, for appellee.)

#### Notes of Iowa cases arising out of machinery accidents.

##### *Employees injured by threshing machines.*

In REYNOLDS v. HINDMAN ET AL., 32 Iowa, 146 (June Term, 1871), employee injured while operating threshing machine, judgment for plaintiff in the Marion Circuit Court was *reversed*. The action seems to have been brought under chapter 135 of the Laws of the Eleventh General Assembly (1866). The plaintiff averred in his petition, in substance, that the defendants were, in the month of November, 1869, the owners of, and were operating, a threshing machine in Marion county; that the tumbling rod, knuckles and joints of the same were not boxed; that the plaintiff was an employee with said machine, and, while engaged therewith in threshing grain, he was caught by the tumbling rod and knuckles of the machine and thereby bruised and injured, for which he claimed damages. The defendants, in their answer, pleaded three defenses, viz.: a general denial of all the allegations of the petition; that the injury was caused by the negligence of the plaintiff; and that the tumbling rods and knuckles were safely secured while running, by patent slip knuckles.

etc. The ruling in the case (per MILLER, J.) is stated in the syllabus to the official report as follows:

"Chapter 135, acts of the Eleventh General Assembly, requiring the tumbling rods of threshing machines to be boxed, and providing that the person or persons owning or running such machine shall be liable in damages to any person injured by reason of neglect so to do, was not intended to change the general rule, applicable to such cases, that a plaintiff cannot recover for injuries resulting from the alleged negligence of the defendant, if his own negligence in any way contributed directly to the injury. The statute merely provides, that a failure to box as required is, *per se*, negligence on the part of the owner or person running the machine, leaving the rule respecting contributory negligence on the part of the injured party to apply the same as in other cases."

In *MESSENGER v. PATE ET AL.*, 42 Iowa, 443 (June Term, 1876), employee injured by negligent operation of a threshing machine which was not boxed as required by statute, judgment for plaintiff in the Clinton Circuit Court was affirmed, it being held that recovery could be had in such a case where the injured party was free from contributory negligence.

*Employees injured by saw machines.*

In *THELEMAN v. MOELLER ET AL.*, 73 Iowa, 108 (October Term, 1887), employee, operating saw machine, injured by his hand being struck by the saw owing to the breaking of a defective rope, judgment for plaintiff in the Scott Circuit Court was reversed for error in withholding the question from the jury as to whether plaintiff and the engineer, operating the engine propelling the saw were fellow-servants.

In *YOUNG v. BURLINGTON WIRE MATTRESS CO.*, 79 Iowa, 415 (January Term, 1890), judgment for defendant in the Des Moines District Court was affirmed, in an action by plaintiff for injuries sustained by falling on a machine in defendant's factory. It appeared that plaintiff was engaged in running a saw propelled by steam in defendant's factory where was other machinery, as a tenon-machine, also propelled by steam. His duties required him to place a belt upon a pulley used to move a circular saw, and, in order to do this, he ascended a ladder to the pulley. The belt "worked hard." In endeavoring to move it, the ladder slipped, caught into another pulley, and threw plaintiff upon a belt running the tenon-machine, and he was finally thrown upon the knives of the machine and his hand injured so that it had to be amputated. It was held that as it was the strain upon the ladder that caused plaintiff to fall, he could not recover on ground of defect in ladder. Nor could recovery be had on ground that there should have been a "shifter," because the pulley was a fixed one, and shifters are not used with fixed pulleys. Nor could negligence be charged on ground that the knives of the machine were not covered, in the absence of a showing that it was customary, or even practicable, to cover such knives.

*Employees injured by machinery.*

In *BECK ET AL. v. ADM'R'S v. FERMINICH MANUFACTURING CO.*, 82 Iowa, 286 (January, 1891) plaintiff's intestate, an employee in defendant's glucose factory, walking backwards towards machinery shaft, caught by the shaft and killed, judgment for defendant in the Marshall District Court was affirmed, on the ground of contributory negligence.

In *Stoutenburg v. Dow, Gilman, Hancock Co.*, 82 Iowa, 179 (January, 1891),

plaintiff, employed as "second miller" in defendant's roller mills, while attempting to clean out material which clogged the grinding rollers, injured by his left hand being caught and crushed between the rollers, caused by a defective appliance, judgment for plaintiff in the Scott District Court for \$4,000 was affirmed.

In *GORMAN v. DES MOINES BRICK MANUFACTURING CO.*, 99 Iowa, 257 (October, 1896), employee injured by machinery, judgment on verdict directed for defendant in the Polk District Court was affirmed, on the ground of contributory negligence. It appeared that it was plaintiff's duty to keep defendant's machinery, used for making brick, in running order; that a certain bearing became heated; that plaintiff poured water on and laid cloths over it, but the heat not being sufficiently reduced he took a wrench and tried to loosen the nuts on the bearing; the wrench slipped and his hand was injured by a cog-wheel, and plaintiff knew that in so using the wrench there was danger.

**DEATH OF SICK EMPLOYEE CAUSED BY ALLEGED EXPOSURE — MASTER NOT LIABLE.** — In *KERR, ADM'X v. KEOKUK WATERWORKS CO.*, 95 Iowa, 509 (October, 1895), it appeared that plaintiff's intestate was an engineer in defendant's works; that while off duty, on account of sickness, defendant's superintendent requested him to come to the works, sending for him a carriage, to make some repairs to the pump; that the intestate went, rectified the trouble in a short time, and then returned home in the carriage; that from that time he continued to grow worse and four days thereafter died from "la grippe." Judgment for plaintiff in the Keokuk Superior Court for \$3,000 was reversed. It did not appear that any force or persuasion was used or whether the intestate was incapable to decide whether he could stand the trip to the works in his then state of health, neither had the defendant any notice that the intestate was not reasonably in possession of his mental faculties. There was no ground upon which to found a verdict for plaintiff.

**DERRICK BREAKING AND FALLING UPON EMPLOYEES — INDEPENDENT CONTRACTOR — FELLOW-SERVANT.** — In *HUGHBANKS v. THE BOSTON INVESTMENT COMPANY AND FAY v. THE BOSTON INVESTMENT COMPANY*, 92 Iowa 267 (October, 1894), two actions for personal injuries alleged to have resulted from negligence on the part of the defendants, a verdict and judgment for the plaintiff being rendered in each case, judgment in the Woodbury District Court in each case, on appeal of defendant company, was reversed. WRIGHT, HUBBARD & BEVINGTON, appeared for appellant; R. H. BROWN and W. H. FARNSWORTH, for appellees. The opinion in the Supreme Court was rendered by ROBINSON, J., who stated the case as follows:

"In the year 1890 the Boston Investment Company, a corporation

of the State of Maine, was having constructed in the city of Sioux City five buildings which were designed for business purposes, one of which was known as the ' Bay State Block.' Contracts for material and labor required for the buildings were made by John G. Mainland in his own name, and he superintended the erection of the buildings. His authority was derived from a written agreement entered into with the company. In May, 1890, he entered into a contract with E. C. Wakefield, by which the latter agreed to furnish all material and labor and to do all mason work required in the erection of the Bay State Block. He commenced work under his agreement and, to aid in performing it, he purchased and set up on the unfinished building a derrick to be used in raising stone and other material required for use. The morning after it was set up, it was used to unload stone from a wagon in the street. While it was being so used, it broke, and a portion of it fell upon or was thrown against the plaintiffs who were working on the building, causing the injuries for which they seek to recover (1). These actions were brought both against the company and Wakefield, but the jury, in each case, returned a verdict in favor of Wakefield. In *Hughbanks' case* a verdict was returned in his favor for \$1,800, and in the *Fay case* there was a verdict for \$7,000. Judgment was rendered in each case in favor of the plaintiff and against the company for the amount of the verdict and costs, and in favor of Wakefield as against the plaintiff. The company alone appeals. The controlling questions are the same in the two cases, and they are submitted together for our determination." \* \* \*

The points decided are set out in the syllabus to the official report as follows:

"One who acts under a contract with a corporation which authorized him to contract for material and labor in his own name, subject to approval, who is employed 'in the construction' of a building,

1. See also the following cases relating to derrick accidents:

In *NEILSON v. GILBERT*, 69 Iowa, 691 (June, 1885), where the proximate cause of the injury to plaintiff was the falling of a derrick caused by negligence of a co-employee in failing to fasten a guy rope, it was held that recovery could not be had where the master had cautioned the servant as to the use of the guy rope. Judgment for defendant in the Warren Circuit Court affirmed.

In *MICHAELSON v. THE SERGEANT BLUFFS & SIOUX CITY BRICK CO.*, 94

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Iowa, 725 (January, 1895), laborer in defendant's brickyard going on a derrick or crane, used in connection with a steam shovel which scraped clay from a bank for the purpose of removing an obstruction at the top of the clay bank, injured by a chunk of clay which fell on his hand, which was on the iron rod of the derrick, and his hand crushed between the rod and the clay, judgment for plaintiff in the Woodbury District Court was reversed on the ground that plaintiff assumed the risks.

is to give his whole time to its construction, to report the cost, and who is to be paid a certain sum 'in full for his services in looking after the execution of said contract and superintending construction of the building,' is a servant of the company and not an independent contractor.

"Where one is to furnish labor and material at prices to be fixed by him and has full control as to using machinery, no control being reserved to the owner, and the contract makes him alone responsible for injury to laborers, he is not an agent of the owner, and he alone is liable for such injury. *Blink v. Hubinger*, 90 Iowa, 642, distinguished (1).

"Where one is actively engaged in superintending the carpenter work on a building, employs men and has general charge of all work in the absence of the superintendent, his authority to act for the superintendent is for the jury.

"The fact that a servant uses the machinery of another does not make the master liable if that other do injury in using such machinery.

"The construction of a written agreement should not be sent to the jury."

In *Blink v. Hubinger*, 90 Iowa, 642, a case specially relied upon by the appellees in the foregoing cases, it appeared that the person injured was not an employee of the contractor, but of the defendant, Hubinger, who had agreed to furnish assistance in doing certain work, and the plaintiff and others had been sent pursuant to that agreement to assist in doing the work, and while so engaged received the injury for which he sought to recover. Therefore the controlling facts in that case were so different from those involved in the cases referred to that the court held they were not governed by the same rules.

i. In *BLINK v. HUBINGER ET AL.*, 90 Iowa, 642 (January, 1894), the facts (as per syllabus to the official report) were as follows:

"The defendants, having agreed to assist S., who was to use his own machinery and appliances in raising a smoke stack, directed their foreman to take the plaintiff, and others in their employ, and help S. in that work. While thus engaged, the machinery used by S., in raising the stack, broke, the stack fell, and the plaintiff was injured. The plaintiff had, for some time, been regularly employed by the defendants, and one of the members of the firm was present during a part of the time that the stack was being raised. Held, that at the time of the injury the plaintiff was not the servant of S., but of the defendants, and that the latter were liable for the damages sustained." Judgment for \$750 for plaintiff in the Lee District Court was affirmed.

**HUMPTON v. UNTERKIRCHER & SONS ET AL.***Supreme Court, Iowa, April, 1896.*

[Reported in 97 Iowa, 509.]

**EMPLOYEE INJURED BY FALL OF SCAFFOLD — INDEPENDENT CONTRACTORS — OWNERS OF BUILDING NOT LIABLE.** — In an action to recover damages for injuries sustained by the fall of a scaffold, it appeared that plaintiff was a bricklayer in the employ of H., who had the contract for the brick work in the construction of a building for defendants; that the carpenter work was contracted for by another person; that the contract for the brick work called for the scaffolding to be furnished by the bricklayer; that the brick and carpenter work was to be performed under the direction of defendants and their architect; that defendant had no control over the employees of the said contractors. *Held*, that the work was being done by independent contractors, and that for the latter's negligence, resulting in injury to their servants, the defendants were not liable (1).

**PLEADING AND PROOF.** — It is essential, in any suit for negligence, that the particular duty neglected be declared upon; a recovery cannot be had for one breach on a petition counting upon another.

**MAXIM — *SIC UTERE TUO UT ALIENUM NON LÆDAS.*** — There being no evidence that the defendants owned the real estate or had accepted any of the work upon the building in course of construction, the maxim, "*sic utere tuo ut alienum non lædas*," did not apply.

**APPEAL** from Des Moines District Court. *Judgment affirmed.*

" Plaintiff was injured by the fall of a scaffold erected by his immediate employer, in the construction of a certain brick building for the defendants, Unterkircher & Sons, in the city of Burlington, and he brought this action to recover damages, alleging that one Hummerum had the contract for doing the brick work, and defendant Hemphill for the carpenter work, all under the direction, supervision, and control of Unterkircher & Sons, or their superintendent employed for that purpose; that plaintiff, while engaged in laying brick in the wall of the second story of the building, received a fall, through the weakness of the floor, upon which a scaffolding was erected to enable him to pursue

i. In *BENN v. NULL*, 65 Iowa, 407 was injured. The scaffold was erected (December Term, 1884), it appeared by a fellow-servant, the defendant not that plaintiff, a house carpenter, was working for defendant, a carpenter, being present. *Held*, that the direction contractor and builder, in building, of the verdict for defendant in the Linn with other employees, a one-story house, and while upon a scaffold it District Court was proper, and judgment gave way and plaintiff fell a distance was *affirmed*, plaintiff's injury being caused by the negligence of a of about five feet to the ground and fellow-servant.

his work, which resulted in a compound comminuted fracture of the bones of his lower right leg, necessitating the amputation thereof; and the defendants were negligent in not providing proper support for the floor on which the scaffolding was erected. The defendants, George and Fred Unterkircher, admitted that Unterkircher & Sons were engaged in the erection of a building, but claimed that it was being done by independent contractors — one, Hemphill, having the contract for the carpenter work, and another, Hummerum, having the contract for the brick work; but they denied that they or their superintendent had any control or direction, or right of control or direction, of the manner in which the work should be done, of who should do it, or of the workmen or appliances to be employed in the accomplishment of their purpose; and they further allege that, at the date of the accident, the work was unfinished and incomplete, and was under the control of the said contractors, respectively; and further denied that they were guilty of negligence in any particular. They further alleged that plaintiff was in the employ of Hummerum, and that he was not in any sense their servant. They also alleged that plaintiff was guilty of negligence contributing to his injury. On these issues the case was tried to a jury, and, at the conclusion of plaintiff's evidence, the court, on motion of these defendants, directed a verdict for them. Plaintiff appeals."

HEDGE & BLYTHE, for appellant.

BLAKE & BLAKE and P. HENRY SMYTHE, for appellee.

**Deemer, J.** — The motion to direct a verdict was based upon the grounds; first, that there was no evidence to show that defendants owned the real estate or the building which was being erected thereon, or that they were in any manner interested therein; second, that no negligence was charged in the petition as against them; third, that the evidence shows that the negligence, if any, was that of a fellow-servant of plaintiff; fourth, that the relation of master and servant did not exist as between plaintiff and these defendants; fifth, that plaintiff knew of the alleged defects in the construction of the floor, and voluntarily remained in his employment, without complaint or promise of repair; and sixth, that, by the exercise of ordinary care, he might have known of the defects; but, that, notwithstanding, he voluntarily remained at his work, without complaint or promise of repair.

To determine the correctness of the ruling, a consideration of the facts as disclosed by the record is essential. The evidence establishes the following: In the year 1892, Unterkircher & Sons, a firm composed of P. F. Unterkircher, Fred L. Unterkircher and George L. Unterkircher, desirous of erecting a brick livery barn upon a lot owned by P. F. Unterkircher, entered into contracts with certain mechanics, among whom were Austin Hemphill and J. Hummerum, for the construction of various parts of the work. Hummerum had a contract for the brick work, which, among other things, contained the following: "The entire work to be done in a good and workmanlike manner, under the direction of E. Kropp and P. F. Unterkircher & Sons, and to their entire satisfaction, approval, and acceptance. \* \* \* In consideration of the faithful performance of the foregoing stipulations and agreements by said second party, the said P. F. Unterkircher & Sons, party of the first part, agree faithfully to have said work duly and fairly estimated by E. Kropp, architect, as rapidly as the work is completed. \* \* \* All the scaffolding to be furnished by the bricklayer." The portions of the contract omitted relate to the work to be done, amount and terms of payment, and other matters not necessary to be here set out. Hemphill had a contract for the carpenter work, which, among other things, provided: "Said work to be commenced on or before the twelfth day of December, 1892, and to be completed sixty days after the brick work is finished. The entire work to be done in a good, workmanlike manner, under the direction of E. Kropp, architect, and P. F. Unterkircher & Sons, and to their entire satisfaction, approval, and acceptance. In consideration of the faithful performance of the foregoing stipulations and requirements by the second party, the said P. F. Unterkircher & Sons, party of the first part, agree faithfully to have said work duly and fairly estimated by E. Kropp, architect, as rapidly as the work is completed." Contracts for the stone work, painting, and every other thing needed to complete the building, were made with other parties. The plaintiff is a bricklayer, and was employed by Hummerum upon the building. At the time of the accident the rear and the two side walls of the structure were completed up to the square of the second story — above the windows of the second floor, where the joists were to be laid. The outside of the front wall was up to the level of the square, and the workmen were then engaged in

backing it up; that is, filling up the inside course of the brick work. A scaffold had been erected so that the bricklayers could reach the work upon this front wall. The floor of the scaffold had for its immediate support short pieces of scantling, one end of which was set into the wall, the other nailed to uprights, which rested on the floor of the second story of the building. As the second floor was to be suspended from a truss in the roof, a temporary support was made for the joists, which was to be removed, and rods from above substituted, after the building was completed. The joists of this second floor were laid on girders, and the girders were held up by posts, which, as we have said, afforded temporary support. The support for the girders referred to was two pieces of two-by-ten, or two-by-twelve joists, put together and stood up on end, under the girders. It appears that these temporary posts, or supports, were not of sufficient strength to carry the second floor, with the material that was being used for the completion of the brick walls; that one of them gave way, and precipitated the whole of the second floor, with all of the material, scaffolding, and men at work thereon, into the cellar, resulting in the injuries complained of. The second floor, with its supports, was erected by, or under the direction of, Hemphill, the carpenter, with the knowledge, and implied consent, at least, of the defendants and their architect. The scaffolding on which plaintiff was working was built in the ordinary manner, on the inside of the building, by the bricklayer, and no fault can be attributed to him, unless it be that he did not discover the condition of the supports, and did not notify plaintiff of the condition thereof, on the day of the accident. It appears, from the evidence, that Hummerum's attention was called to the fact that one of these supports was bent on the day plaintiff was injured. It may be that it was his duty to notify the workmen of this fact; but this we need not decide, for no attempt is made to charge him personally in this action. And we will not consider the matter further than to determine whether defendants should be held liable for his neglect. It further appears, from the testimony, that the attention of Kropp, the architect, was called to the insufficiency of the support for the girders some days before the accident; and it also appears that plaintiff saw these supports, and knew how the floor of the second story was constructed and sustained. From these facts we are to determine whether either Hemphill or Hummerum was

the servant of the defendants, or stood in such relation to them as that they should be held liable for the negligence of either.

Defendants contend that both the brick mason and the carpenter were independent contractors, for whose negligence they are not responsible; while plaintiff, on the other hand, insists that they were servants of the defendants, engaged in doing the work, which they undertook to do, under the control, direction and management of Kropp, the defendants' architect, and that defendants are responsible for the negligence of either. Many rules have been laid down for the determination of the question as to who are independent contractors. But the best definition we have been able to find is that given in *Powell v. Construction Co.*, 88 Tenn. 692: "An independent contractor is one who, exercising an independent employment, contracts to do a piece of work according to his own methods, and without being subject to the control of his employer, except as to the result of his work." Applying this test to the case at bar, it will be seen that each of these parties is exercising an independent employment; that he contracted to do a certain portion of the work according to his own methods, and without being subject to the control of his employer, except as to the results of the work. It is true that each contract provides that the work was to be done under the direction of the defendants and their architect, and to their entire satisfaction, approval and acceptance; but it is manifest that this direction, approval and acceptance had reference to the time within which it should be performed, with reference to other parts of the work, and to the results to be accomplished, and not to the method or manner in which it should be performed. Defendants had no control over the men who should be employed by either of these contractors. They could not say who should be employed, or who discharged. They had the right, under their contracts, to say what should be done, but not how it should be brought about, or who should do it.

Appellant relies largely upon the use of the word "direction," as employed in the contracts referred to. We do not regard this as in any sense conclusive. When we look at the whole contract, it is apparent, that the only direction the architect or the owner could give, was, as to what should be done to accomplish the ends aimed at by the contract. He could not dictate the means or methods to be employed. This is the interpretation which has uniformly been placed upon such contracts. *Hughbanks v.*

Boston Investment Co., 92 Iowa, 267, 14 Am. Neg. Cas. 592, *ante*; Callahan *v.* R. R. Co., 23 Iowa, 562; Nevins *v.* Peoria, 4<sup>1</sup> Ill. 502; City of Erie *v.* Caulkins, 85 Pa. St. 247; Eaton *v.* R'y Co., 59 Me. 520; Kelly *v.* Mayor, etc., 11 N. Y. 432; Miller *v.* R'y Co., 76 Iowa, 655. It is perfectly manifest that the defendants had no control over Hummerum, in the building of the scaffold, for the contract expressly provides that he was to furnish it himself. As both of these mechanics were independent contractors, it follows that the defendants are not liable for any injury which may have happened to the servants or employees of such contractors, through the negligence of such contractors or their servants.

The doctrine of *respondeat superior* has no application as a general rule to such a case, for the contractor is in no sense a servant of the employer. Kellogg *v.* Payne, 21 Iowa, 575; Waltemeyer *v.* R'y Co., 71 Iowa, 626; Wood *v.* School District, 44 Iowa, 27; Miller *v.* R'y Co., *supra*; Wood *v.* Cobb, 13 Allen, 58; Kelley *v.* Norcross, 121 Mass. 508; Fanjoy *v.* Seales, 29 Cal. 244, 13 Am. Neg. Cas. 453. There are some exceptions to the rule above stated; for instance, if the injurious act complained of was contemplated by the contract, or if the work was necessarily dangerous or harmful *per se*, and in some other cases the contractee is liable. Wood *v.* School District, *supra*. But this case is not claimed to come under way of these exceptions, and no further attention need be given them.

It is contended, on behalf of appellant, however, that it was the duty of the defendants to furnish him a safe place to work, and that, as they did not do so, they are liable, although the fault may have been originally with the carpenter, who was an independent contractor. This contention, if it has any merit, is based upon the assumption that the plaintiff was the servant of the defendants, and was in their employ as such. We have already seen that plaintiff was not a servant of the defendants. He was employed by Hummerum, and was subject to his orders and directions. The duty of furnishing him a safe place to work devolved upon his immediate employer, and not upon the defendants. To them he was no more than a stranger; and they owed him no other duty than to anyone who might come upon their premises under an implied license or invitation. He was there rightfully, of course, in the prosecution of his work; but defendants owed him no special duty. Moreover, the contract

between Hummerum and the defendants expressly made it the duty of the contractor to erect and furnish the scaffolding. Defendants had no part or lot in it. There was no contract relation, either express or implied, between plaintiff and the defendants. As between them there was no relation whatever, other than that which springs from the common bond of society, which imposes upon every man the duty of so using his own as to do no injury to his fellow-men. It follows, then, that the plaintiff cannot recover because of any breach of duty owing him by the defendants, unless it be the general one last above stated. But he does not rely upon this one as a basis for his action, and we have no occasion to consider whether he could recover under such a theory. It is essential, in any suit for negligence, that the particular duty neglected be declared upon. A recovery cannot be had for one breach on a petition counting upon another. *R. R. Co. v. Stark*, 38 Mich. 714. The breach counted upon in this case was of the duty owing by a master to his servant. No other can be considered. It is well to note, in this connection, however, that the pleadings do not allege, nor does the proof show, that the defendants owned the real estate in question. Neither is there any evidence showing, or tending to show, that they had accepted the carpenter work. No part of the building had been completed or accepted by them at the time the accident occurred; so that there is no room for the application of the maxim, "*Sic utere tuo ut alienum non laedas.*"

Appellant relies upon the cases of *Fink v. Des Moines Ice Co.*, 84 Iowa, 321, and *Haworth v. Seevers Mfg. Co.*, 87 Iowa, 765 (1). Neither of these cases is in point. In the Fink case the defendant constructed the trestlework and the plaintiff was in the employ of the defendant — was its servant, engaged in its work. In the Haworth case plaintiff was in the employ of the defendants

1. In *FINK v. DES MOINES ICE CO.*, 84 Iowa, 321 (January, 1892), employee, engaged in assisting the movement of ice along an ice slide from the river to an ice house, injured by being thrown to the ground by the giving way of trestlework on which he was working, the same being imperfectly constructed, judgment for plaintiff in the Polk District Court for \$1,000 was affirmed.

In *HAWORTH v. SEEVERS MANUFACTURING CO. ET AL.*, 87 Iowa, 765 (Fe-

ruary, 1892), employee, engaged in putting up rafters in a wooden building being erected by defendants, injured by the breaking of a board connected with the scaffolding on which he was standing, which threw him to the ground about ten feet, and he sustained a spinal injury resulting in paralysis of the lower limbs, etc., judgment for plaintiff in the Mahaska District Court for \$2,000 was affirmed.

in the erection of a building near its works, under the personal supervision of the firm, and defendants furnished the materials upon which plaintiff was working, which proved unsound. The distinction between these cases and the one at bar is so manifest that we need not say more. The learned district judge correctly sustained the motion to direct a verdict. Our conclusions find support in the cases of *Tredwell v. Mayor, etc., 1 Daly, 123*, and *Mercer v. Jackson, 54 Ill. 397*.

The judgment is affirmed.

**ASSAULT BY EMPLOYEE UPON TRESPASSER — SCOPE OF EMPLOYMENT — MASTER NOT LIABLE.** — In **GOLDEN V. NEWBRAND ET AL.**, 52 Iowa, 59 (*December Term, 1879*), an appeal from judgment for defendants in the Mahaska Circuit Court, in action for damages for injuries sustained by plaintiff, caused by being shot by defendant's watchman, judgment was *affirmed*, it being held that the shooting was not done within the scope of the employee's duty. The court (per **SEEVERS, J.**) stated the facts as follows:

"Using the language of appellant's counsel the following facts were established: 'That the defendants, ever since 1876, have been owning and operating a brewery in the city of Oskaloosa, Iowa, under the firm name and style of Blattner & Newbrand, and that Charles Blattner, during all that time, has been and is now their superintendent, managing and running the business, and that one Max Roenspeiss during all that time has been and is now a hand employed in the business there under the control of Charles Blattner, and paid his wages by him out of the firm's moneys, and that a part of his business was to guard the brewery, and he slept there at night for that purpose, and that there was a revolver kept there by the firm, and Roenspeiss had access to it and slept with it under his pillow at night; that defendants were engaged in the business of manufacturing and selling beer, and, like all other beer saloons, rows were likely to occur, and Roenspeiss was empowered to protect the property and to quell disturbances, and worked there in the business generally. In the afternoon of the day David Golden was killed, he and his brother were there drinking beer, and got kicked out of the brewery. Afterwards, about supper time, they went back to the brewery and drank some more beer, and being a little drunk, mad and crazy, John Golden got into a little fracas with John Mackey, and they skirmished until they got out of the brewery. In the meantime Max Roenspeiss came out of the office, where

the revolver was kept, and approached the east door, and just about that time David Golden, being out of doors on the east side of the brewery, threw a brick into the brewery, and hit the copper cooler, and Roenspeiss started out at the east door after him, and Dave turned and ran. Then Roenspeiss, after going fifteen or twenty feet from the brewery, fired and shot Dave in the back of the head, and he fell forward on his face, about forty or fifty feet from the brewery.'

"Conceding the evidence was as above stated, it did not, in our opinion, show that the defendants were liable. It was, therefore, immaterial, and was properly excluded. The theory of appellant is that Roenspeiss was employed to guard and protect the brewery, for which purpose he was furnished with a pistol, and that he shot the deceased while in the line of his duty. Without determining whether if this was all the defendants would be liable, we think the fact that the deceased was retreating from the brewery, at the time the fatal shot was fired, shows conclusively it was not fired for or with the intent of protecting the brewery, or in the line of Roenspeiss' duty. If Roenspeiss had shot with the pistol from the brewery a person peaceably passing along the highway, the defendants clearly would not have been liable, and we think there is no essential difference between the case supposed and the one at bar. To protect the brewery did not require Roenspeiss to shoot and kill a person who was retreating therefrom. The killing was not, therefore, done in the line of the duty Roenspeiss was employed to perform." \* \* \*

BRAKEMAN KILLED WHILE UNCOUPLING TRAIN — RULES — CONDUCTOR AND BRAKEMAN — FELLOW-SERVANT — STATUTE — ASSUMPTION OF RISK. — In *KROY V. CHICAGO, ROCK ISLAND & PACIFIC R'Y CO.* 32 Iowa, 357 (*December Term, 1871*), head brakeman on freight train killed while uncoupling a train in motion, judgment for plaintiff, the administratrix of deceased, on verdict for \$3,000, in the Scott Circuit Court, was *reversed*. DAY, Ch. J., in his opinion, stated that the testimony in the case established the following facts:

"In December, 1868, Claus Kroy was head brakeman on a freight train of defendant, in which employment he had been engaged three or four months. His position was in the forward cars, and sometimes, in extremely cold weather, he occupied the engine. Upon the night of the accident, as the westward bound train, consisting of twenty cars, with a caboose on the rear end, approached within a mile and a half of Atalissa station, at the rate of fourteen

miles an hour, the deceased, who was riding on the engine, asked the engineer if he should pull the pin attaching the locomotive to the train. The engineer said he thought not; deceased replied that if they did not they would be late getting home; the engineer said that they had better be late getting home than to hinder the passenger train any. After a short time deceased again asked if he should not pull the pin. The engineer directed him to wait till they got around in full view of the station. When the train came in view of the station, and it was discovered that the passenger train was not in sight, deceased, a third time, asked if he should not pull the pin, and the engineer said: "Well, go ahead." The night was fair, starlight, with no moon, and not extremely cold. Deceased proceeded with a lantern, for the purpose of uncoupling the train, while the same was in motion, and two-thirds of a mile from the station. It is necessary that a brakeman uncoupling a train in motion should put one foot on the ladder at one side of the end of the car, or on the "dead wood," a stick of timber three or four inches wide, fastened to the end of the car over the bunter, and, holding on with one hand, reach down and pull the pin with the other. There is more danger in uncoupling a train in motion than when still. Deceased succeeded in pulling the pin, and was not afterwards seen upon the train, but a short time thereafter was found lying upon the track, at about the point where the train was uncoupled, dead, and badly mangled. It is not necessary to uncouple cars in motion, but there are no rules or orders of the company to stop a train before uncoupling, a discretion in the matter being left to the trainmen. Upon the train in question the trainmen, of whom decedent was one, had established a custom of uncoupling the train at Atalissa station, while in motion. This was almost always done. The engineer expected Kroy to uncouple here every night, and, without asking the conductor, unless he was forbidden to do so. Uncoupling in such manner was a matter of convenience to all parties. It relieved the brakeman from the necessity of getting down from the train and passing between it and the locomotive. The engine could stop easier and better at the tank without than with the train attached, and, if the train stopped for the purpose of uncoupling, sometimes the pin would become fastened, rendering it necessary to move the train back and forth to loosen it. The engineer refused to permit Kroy to uncouple the train when he first desired to do so, in consequence of not being near enough to see whether the passenger train was at the depot. At the time of the accident the conductor was on the caboose car. The brakeman is under the charge of the conductor. The engineer has no authority

to send a brakeman to pull a pin when in motion although, if he directed him to do so, he would expect him to obey, and, if he refused to do so, would report him to the conductor. Under the rules of the company the general direction and government of the train is vested in the conductor, but the engineer is held alike accountable for any violation of the general rules of the company."

\* \* \*

In discussing the points of law the court said: "At common law, the master is liable to his servant for injuries resulting from his neglect to use ordinary care and diligence to provide sound and safe materials and accommodations, and to employ servants of sufficient care and skill to make it probable that they will not, by the lack of those qualities, cause injury to each other. But a master is not liable to his servant for the negligence of a fellow-servant, while engaged in the same common employment, unless he has been negligent in his selection of the servant in fault, or in retaining him after notice of the incompetency. Shearm. & Redf. on Negligence, §§ 86, 90, 92, and cases cited. This rule of the common law was modified by § 7, chap. 169, Laws Ninth General Assembly, which provides: "Every railroad company shall be liable for all damages sustained by any person, including employees of the company, in consequence of any neglect of the agents or by any mismanagement of the engineers or other employees of the corporation to any person sustaining such damage." This statute received judicial construction in the case of *Hunt v. Chicago & N. W. R'y Co.*, 26 Iowa, 363 (1), in which it was held that the statute imposes the same liability upon a railroad company for injuries to a servant, resulting from the negligent act of a fellow-servant, as the common law before imposed upon the master for an injury to a servant, the result of the master's negligent act, and hence, that under the statute the company was liable to a servant for such injuries only as were the result of a failure upon the part of a fellow-servant to exercise reasonable and ordinary care. It will be thus seen that a much lower degree of responsibility rests upon the company for an injury to an employee than for a like injury to a passenger.

Another important modification of the liability of a master for an injury to an employee, which is sustained by an almost unbroken

1. In *HUNT v. CHICAGO & NORTH-WESTERN R.R. CO.*, 26 Iowa, 363 (December Term, 1868), brakeman descending from freight car while train was switching and in motion, struck by projecting cattle chute, thrown from car and one of his arms crushed, judgment for plain-

tiff in the Clinton District Court for \$12,000 was reversed for erroneous instruction on the question of care required on part of railroad company as to its employees, and erroneous charge on damages.

current of authority in this country and in England, is, that if the servant knows that a fellow-servant is habitually negligent, or that the materials with which he works are defective, and continues his work without objecting, and without being induced by his master to believe that a change will be made, he is deemed to have assumed the risk of such defects. This rule finds its support in the reason that the continuance of the servant in the employment of his master is purely voluntary, and if he so continues without objection, with knowledge of defects in machinery or the incompetency of his co-employees, he is presumed to have waived the right to insist upon indemnity for injuries resulting from such incompetency and defects. *Shearm. & Redf. on Neg.*, § 94, and cases cited.

It is scarcely necessary to allude to the elemental doctrine that one cannot recover for an injury which is the proximate result of his own failure to exercise ordinary care. An application of these principles to the facts of the case at bar will, we think, render it apparent that they do not justify the verdict and judgment rendered in the court below. The deceased had been employed upon this train for three or four months, during which time the almost unvarying habit had been to detach the locomotive from the train at Atalissa station, while in motion. And, as he occupied a position upon the forward cars, this duty devolved upon him. Yet so far was he from protesting against this course, and requesting its abandonment by the company, that he voluntarily assumed the performance of this act, and, by his active co-operation, contributed to the establishing of the custom. Not only so, but upon the particular occasion of the injury, he three times requested to be permitted to draw the pin, and assigned as a reason for desiring to do so, that otherwise they would be late getting home." \* \* \* Citing *Mad River & Lake Erie R. R. Co. v. Barber*, 5 Ohio St. 562; *Greenleaf v. Ill. Cent. R. R. Co.*, 29 Iowa, 14 [the case next reported herein].

The deceased was held to have assumed the risk by remaining in defendant's employ with knowledge of the custom without complaint or protest, and recovery could not be had for injury resulting therefrom. Judgment for plaintiff reversed.

## GREENLEAF v. DUBUQUE & SIOUX CITY RAILROAD COMPANY.

*Supreme Court, Iowa, December, 1871.*

[Reported in 33 Iowa, 52.]

**QUESTIONS OF LAW AND FACT.** — The case of *Greenleaf v. Ill. Cent. R. Co.*, 29 Iowa, 14, holding that the question of negligence, when the facts are disputed, becomes a mixed question of law and fact, which must be left by the court to the jury, followed.

**BRAKEMAN KILLED — ORDINARY CARE — CONTRIBUTORY NEGLIGENCE.** — In an action against a railroad company for the death of an employee, a brakeman in the company's employ, killed while in the performance of his duties, it was held that if the employee exercised reasonable and ordinary care at the time of the injury, he was not guilty of contributory negligence.

**ASSUMPTION OF RISK — KNOWLEDGE OF DEFECTS.** — The servant does not, by simply remaining in the employ of his master, with knowledge of the defects in the machinery which he is obliged to use, assume the risks attendant upon the use of such machinery. Such results follow, only, when he remains in the master's service without objection or protest against the continuance of the defects.

**APPEAL** from Dubuque District Court where judgment was rendered for plaintiff for \$5,000. The case is stated in the opinion. *Judgment affirmed.*

CRANE & ROOD, for appellant.

H. B. FOUKE and O. P. SHIRAS, for appellee.

**Day, Ch. J.** — I. Upon the conclusion of the evidence, the defendant filed a motion, requesting the court to direct the jury to find a verdict for the defendant, upon the ground that "the evidence will not authorize, or warrant, the jury to find a verdict for the plaintiff." This motion was overruled. The defendant excepted and assigns the ruling as error. The motion was properly overruled.

The evidence tended to establish the following facts: Sidney S. Macy was in the employ of the defendant as brakeman. On January 8, 1866, at Ackley station, he was standing on top and near the center of a box car on defendant's road, with his back toward the water-spout, watching for a signal from the conductor to be communicated to the engineer, and, as the train moved, he was knocked from the top of the cars, by his head coming in contact with the spout of the water tank. He fell upon the track, with his feet on the outside and his head and shoulders on

the inside, and, while in this position, the five rear cars of the train passed over his body, killing him instantly. Owing to the length of the chain attached near the top of the water-spout, to bring it back to the building when not used, the spout extended eighteen inches further over the track and hung a foot lower than such spouts usually do. It hung so low that a man, standing on top of the box cars, was obliged to stoop down to avoid it. The plaintiff knew of its condition before the accident occurred. Under this testimony the question of defendant's liability was properly submitted to the jury. See *Greenleaf v. Ill. Cent. R. R. Co.*, 29 Iowa, 14 (I).

I. In *GREENLEAF v. ILLINOIS CENTRAL R. R. CO.* 29 Iowa, 14, it appeared that plaintiff recovered a verdict and judgment for \$8,000, which, however, on appeal, was reversed for erroneous instruction. The facts in the case are stated in the opinion by WRIGHT, J., as follows:

"The accident occurred at Waterloo, Black Hawk county, in October, 1868, between four and five o'clock in the morning. The train left Dubuque the previous evening about six o'clock. The night had been cold, the morning was damp and disagreeable, and it had snowed, or the mist had frozen. It was a freight train of six cars, but a caboose car, which is usually attached to such a train, was wanting. Nor was there any stove in either car, where the employees could warm. As this train approached the depot, it was found that the 'night express' was on the main track. The freight was therefore stopped some six hundred feet east, and remained some thirty or fifty minutes for the passenger train to get out of the way. As the freight was not to go beyond this point, the engineer and brakeman, including decedent, concluded to make what is known as a 'flying switch' and thus place their train on the north side track, where it would be out of the way and where it belonged. But for the 'night express,' the freight would have been

run to the west end of the north switch and backed onto it, which was the usual way of placing trains upon the side track; though there is testimony tending to show that 'the making of flying switches was of every day occurrence.' The conductor of the freight train left it soon after it stopped, and went to the depot. There is testimony, however, tending to show that he was aware that the employees were making this switch — that he was near the train at the time and signaled the engineer to stop as soon as he discovered the accident. He knew nothing, however, of the agreement between the engineer, fireman and brakeman to thus dispose of the train nor did he direct the movement of the train.

"A flying switch is made by uncoupling the cars from the engine while in motion, and throwing the cars onto the side track, by turning the switch, after the engine has passed it, upon the main track. In this instance, one brakeman attended to the switch, while decedent's intention was to draw the pin between the tender and the cars. In doing this, he was thrown, or was compelled to jump, from the end of the car, upon which it is believed he was standing or to which he was holding; the six cars passed over his body and he was instantly killed. The jury could reasonably conclude (as they find in their special verdict) that the car

2. Appellant insists that the court erred in refusing to give the second, third, fourth, fifth, sixth, seventh, eighth and ninth instructions asked by defendant. The second instruction is as follows: "If you find from the evidence that, at the time said Macy was injured, he was riding on defendant's cars, from near the depot toward the water tank where said injury occurred; and that he was knocked off the cars by the spout of said tank;

next to the tender was wanting in the usual, if not all, the appliances commonly used by other railroad companies for the safety and protection of brakemen, and this, because it was lacking in a platform, a brake rod, ladder or handle-rod on the end of the car, and other appliances spoken of by the witnesses. Plaintiff's theory is, that defendant was negligent in three respects: First, in not furnishing a caboose car, whereby deceased was necessarily exposed to the cold and storm, and became so benumbed that he fell and lost his life. Second, in not furnishing a car with the necessary and usual appliances for the safety of those whose duty it was to assist, as decedent did, in uncoupling the cars. Third, in not providing by rules for the removal of the passenger train, within a reasonable time, thus permitting the freight to be set upon the side track in the usual way, without resorting to the flying switch,

"Under these circumstances and upon these facts it would certainly be going a great way, and beyond any case brought to our attention, to say that the facts were ascertained and settled, and that nothing but a question of law remained, which it was for the court to decide. And this remark and this thought applies to and disposes of defendant's instruction to the effect that plaintiff had not introduced sufficient evidence to entitle him to recover, and that the verdict should, therefore, be for defendant. And see Donaldson v. M. & M. R. R. Co., 18 Iowa, 280; Sherman v. Western Stage Co., 24 Iowa,

515 (9 Am. Neg. Cas. 328n). These cases are in accord with the authorities before cited, and fully sustain the conclusion, that the court below properly overruled defendant's motion and refused said instruction. Shear, & Redf. on Neg., § 1, and cases cited in note 3; Snow v. Housatonic Co., 8 Allen, 441."

The DONALDSON case referred to in the preceding paragraph is as follows:

In DONALDSON ET AL., ADM'RS v. MISSISSIPPI & MISSOURI R. R. CO., 18 Iowa, 280 (June Term, 1865), it was held that while the master is not liable for all the torts of his servants, he is liable for those which are done in his service. In this case the plaintiff's intestate was a sub-contractor for the building of bridges on defendant's road and was engaged with others in their employ, in loading bridge timbers on defendant's cars at a depot. After finishing loading they started to go across several tracks at the depot to assist another person in loading a wagon on a car, and deceased, while crossing, was struck, run over and killed by a freight train which had been switched on one of the tracks and was being pushed at a greater speed than usual, no signal being given. Plaintiff recovered a verdict and judgment for \$1,500 which was affirmed by the Supreme Court. It was held that the sub-contractor was not a co-servant of those employed by defendant in operating and managing its train. The Carlisle Life Tables were admissible on the question of damages for the purpose of showing life expectancy.

and that he could have avoided a collision with said spout, by stooping or moving to either side of said car, and still perform his duty; and that he did not so avoid said spout, then he was negligent, and you must find for the defendant." This instruction was rightly refused. It requires too great a degree of care and circumspection. It makes no allowance for the ordinary imperfections of humanity. It requires absolute perfection of attention to surroundings, while the mind is concentrated upon a particular duty. So high a degree of caution the law does not enjoin. It requires only the exercise of reasonable and ordinary care. And this consists in the doing of nothing which a man of reasonable caution and prudence would not do, and in the omitting to do nothing which a man of such prudence and caution would under the circumstances do. The fourth, fifth and sixth instructions are substantially the same as the second, and were properly refused. The third instruction is as follows: " If you find from the evidence that the spout of said water tank, mentioned in plaintiff's petition, was in an unsafe and dangerous position; and that said Macy knew, or had a reasonable opportunity to inform himself, that said spout was in an unsafe or dangerous position, then he is to be presumed, by remaining in defendant's employ, to have accepted the risks arising therefrom, and the plaintiff cannot recover in this action, for any injury to said Macy, on account of said spout being in such unsafe or dangerous position." The seventh, eighth and ninth instructions are, substantially, the same. These instructions were rightly refused. They lack an essential element. The servant does not, by simply remaining in the employ of his master, with knowledge of defects in the machinery which he is obliged to use, assume the risks attendant upon the use of such machinery. Such results follow only when he remains in the master's service without objection or protest against the continuance of the defects. See *Kroy v. Chicago, R. I. & P. R. Co.*, 32 Iowa, 357, and authorities cited (1).

3. It is claimed by appellant that the court erred in the second, third and seventh paragraphs of its charge. The third paragraph of the charge of the court is as follows: " It is claimed by defendant that Macy knew the dangerous condition of the spout, and should have so acted as to avoid striking the same, and that,

1. See the *KROY* case, preceding case reported herein.

failing to do so, he was guilty of contributory negligence. The question of negligence is for the jury to decide under all the evidence in the case, even if it appeared that Macy knew the dangerous condition of the spout. While it is a circumstance to be taken into consideration by you, it is not necessarily a decisive one. If the service to be performed by Macy was of a character to require that his exclusive attention should be fixed upon it, and that he should act with rapidity and promptness, it could hardly be expected that he should always bear in mind the existence of the defect, or be prepared, at all times, to avoid it. Taking all the facts into account, it is for you to determine whether Macy was guilty of such negligence as contributed directly to his death. If you find that he was not guilty of such negligence, and that the accident was caused by the neglect of the defendant, then your verdict should be for plaintiff." Substantially the same principle is involved in the second paragraph. These instructions are in accord with our views. They are in substance and effect, though not in language, the opposite of those asked by defendant, and which, we have held, were rightly refused. They present a wise and humane view of the law, and, if they were altogether without precedent, their justness and reasonableness would commend them to our favorable consideration. They are, however, not without support from adjudged cases. See *Snow v. Housatonic R. R.*, 8 Allen (Mass.), 441.

4. It is claimed by appellant that the seventh paragraph of the charge of the court is incomplete and that it misled the jury. It is as follows: "If you find from the evidence that defendant was guilty of negligence contributory to the accident, you will inquire whether the deceased was, also, guilty of negligence or a want of ordinary care under the circumstances. In considering the question of negligence on the part of Macy, you will have regard to all the circumstances of the case, whether or not he knew the condition of the spout mentioned by the witnesses, and, if so, whether he could have avoided the spout by stooping, or change of position, and if he knew the condition of the spout, whether Macy was guilty of negligence in continuing to perform the duties required of him." It is objected to this instruction that the court told the jury that they should have regard to and consider the facts therein referred to, but nowhere instructed them what effect or influence these facts, if found to exist, should have upon their verdict. And reference is made to *Muldowney v.*

Ill. Cent. R. Co., 32 Iowa, 176 (1) That case differs from this in two essential respects: 1. In that case the court refused, when specifically requested by the defendant, to instruct the jury, that to entitle the plaintiff to recover she must prove that her intestate was not guilty of negligence which contributed to the injury. No such specific request appears to have been made in this case. 2. In this case the court instructed the jury that to entitle the plaintiff to recover, the jury must be satisfied, by a preponderance of evidence, that Sidney S. Macy was, at the time of the accident, exercising ordinary care and prudence to save himself from injury. No such instruction was given in that case. An instruction the same in effect, and almost identical in language, with the one refused in that case, was given in this. The case, therefore, is no authority for the position assumed.

We have thus examined all the errors insisted upon in appellant's argument, and find nothing in the record demanding a reversal of the cause. Judgment affirmed.

### MULDOWNEY, ADM'X V. ILLINOIS CENTRAL RAILROAD COMPANY.

*Supreme Court, Iowa, December Term, 1874.*

[Reported in 39 Iowa, 615.]

**BRAKEMAN INJURED COUPLING CARS WHILE IN MOTION — WARNING — CONTRIBUTORY NEGLIGENCE.** — Where a brakeman, in disregard of warnings from bystanders that it was dangerous to attempt to couple cars to a train on account of the rapid motion, attempted to couple cars while in motion and was injured, it was held that the employee was guilty of such contributory negligence as would preclude a recovery in action for damages brought by his administratrix.

**KNOWLEDGE OF DEFECTS — ASSUMPTION OF RISK.** — Where an employee knows, or has the means of acquiring knowledge by the exercise of ordinary care and diligence, of the defects or imperfections in the machinery or cars about or upon which he is employed, and continues in his employer's service without objecting to, or protesting against, the use of such defective or imperfect cars or machinery, he will be presumed to have assumed all the risks incident thereto.

**PROXIMATE CAUSE.** — Where it was the duty of an employee to regulate the speed of the cars he was attempting to couple, but he failed to so regulate the speed, and such failure was wholly or in part the proximate cause of the railroad accident producing the injury, he was guilty of negligence, and recovery could not be had for the injury.

i. The MULDOWNEY case is the next case reported herein.

**EXPERT AND OPINION EVIDENCE.** — A medical man's opinion is competent when the facts upon which it is based are testified to by himself, or by others, but his opinion, without the facts, is not competent, as he is not authorized to find or assume facts — they are to be found by the jury.

**APPEAL** from Dubuque Circuit Court. *Judgment reversed.*

" This action was originally brought by Edward Laughlin, May 8, 1869, to recover for injuries resulting to him September 9, 1868, while engaged in coupling cars for the defendant. The said Edward Laughlin died May 13, 1869, and the suit was revived by substituting the administratrix as plaintiff. An amended petition was filed, wherein the plaintiff claims to recover \$25,000 because of the injuries to and death of the said Laughlin, which are alleged to have resulted from the defendant's negligence, and without Laughlin's negligence or fault. The defendant denies negligence on its part, and that deceased was negligent, and avers that the death resulted from Laughlin's imprudence and disregard of the directions of his physicians. Jury trial. Verdict and judgment for plaintiff for \$7,665. The defendant appeals."

CRANE & ROOD and SHIRAS, VAN DURZEE & HENDERSON, for appellant.

ADAMS & ROBINSON, T. S. WILSON and W. J. KNIGHT, for appellee.

**Cole, J.** — A brief statement of the facts which the evidence tends to, and does very satisfactorily establish, will render the points ruled more clear and certain. The deceased was brakeman and baggagemaster for the defendant at the time of the accident, and had been for a year or two preceding, and was both faithful and skilful in his employment. At about six o'clock on the morning of September 9, 1868, a mixed train on which deceased was employed, arrived at Ackley, on its way east; two loaded freight cars were at that station, and were to be attached to this train; in the discharge of his duty, the deceased went to switch the two freight cars from the side track, and couple them to the train; the baggage or express car, to which the freight cars were to be coupled, was left on the main track together with two passenger cars to which it was attached, while the engine, tender, etc., went east to the switch, and thence back upon the side track for the freight cars; from the switch west, to where the baggage and passenger cars were left standing, the grade was considerably descending; as the two

freight cars were hauled, by the engine, up to the switch, placed upon the main track and started west towards the train, the deceased undertook alone to brake them down and couple them to the train; the deceased was riding them down, and was at the brake on the east end of the freight cars; by reason of the impetus from the engine and the descending grade, the freight cars were moving too rapidly to couple with safety; the deceased, without checking their speed by the brake, or so setting it as to operate as a further brake, got down from the freight cars while they were moving at the rate of four or five miles per hour, ran or walked rapidly to and in front of them towards the train, for the purpose of coupling them to the baggage car or train; while he was thus walking or running in front, and was about to couple them, he was warned by two or more persons connected with the train, not to attempt to couple them for it was dangerous, the cars were moving so fast; the deceased disregarded the warnings, and attempted to couple the cars, but they came together with such force that, the brakes of the train being set, the bumper of the baggage car was higher than that of the freight car, so that only about two and a half inches of their faces came in contact; all baggage, express and passenger cars are made higher than freight cars; the deceased had been accustomed to use the same baggage car, and the same kind of freight cars; three kinds of coupling were used on the road — a straight link for bumpers of equal height, a crooked or S. link for bumpers of slightly unequal height, and a three-link coupling for bumpers of greater inequality of height; a three-link coupling was put in the baggage car (probably by the deceased, since the other employees on the train testify that they did not do it) before starting to switch the cars on the main track and couple them; directly after the injury Laughlin was taken from between the cars, and medical care and treatment promptly furnished; he gradually improved for four days, and then, contrary to the advice of both of his physicians, he went on a train to Dunleith, and became a little worse; after a few days he went to Dubuque to consult a physician, who prescribed for him, and, in accord with the others, directed that he should keep very quiet; he improved for a few days, and then returned to his Dubuque physician again, who told him that it was as necessary as ever for him to keep quiet; this injunction he did not obey, and on November 5, 1868, when his Dubuque physician was called to

see him, he found him in bed, with his wounds worse, and he continued to grow worse and suffered intensely from that time to May 13, 1869, when he died; his condition became very repulsive, and for months the care of him was loathsome and onerous; he was a little over twenty-two years of age when he died.

The defendant asked the court to give to the jury the following instruction, which the court refused, to-wit.: "If you find from the evidence that at the time said Laughlin attempted to make the coupling he was warned by by-standers that such attempt was imperilling his safety, and that such warning was sufficient to call his attention to the danger threatening him, and was in season to afford him an opportunity to avoid said danger, and that, notwithstanding such warning, he attempted to make such coupling and was injured; and that the making of said coupling was unusually dangerous in consequence of any cause which was then and there open to view, and could with ordinary care have been seen by him, then he was guilty of contributory negligence, and your verdict should be for the defendant."

The counsel for the appellee do not controvert the correctness of this instruction, but they claim, first, that there was no evidence upon which to base it, and hence it was not error to refuse it. If their claim as to the evidence was not a mistaken one, their conclusions would be unquestionably correct. But by reference to the preceding summary of the evidence, it will be seen that the instruction was peculiarly moulded to it, and would justify, if it would not require, the finding of the jury of every fact which it recites. But, secondly, they claim that the instruction is covered by the third, fourth and tenth given by the court. Neither of those instructions, however, refers to the fact of the warning given deceased by others, nor do they present to the mind of the jury, even remotely, the precise questions of fact presented by this instruction. We need not copy the instructions referred to. The third states the abstract legal proposition, that to entitle plaintiff to recover, he must prove that the injury was caused by the defendant's negligence, and that negligence by the deceased did not contribute to it. The fourth, that negligence in law is the omission to do something which a reasonable, prudent man would do, or the doing of something which such a man would not do. The tenth tells the jury that the deceased had the right to presume that the defendant was not using cars

with bumpers mismatched, unless he knew, or by ordinary care might have known, otherwise. Each is but an abstract proposition of law, and the last, in the way it is stated to the jury, is of doubtful correctness. They do not cover the ground of the instruction asked and refused. Such refusal was, therefore, error.

The defendant also asked the court to give to the jury the following instruction, which was refused: "4. When an employee has knowledge, or has the means of acquiring knowledge by the exercise of ordinary care and diligence, of the defects or imperfections in the machinery or cars about or upon which he is employed, and continues in his employer's service without objecting to, or protesting against the use of such defective or imperfect cars or machinery, he will be held to have assumed all the risks incident to the use of the cars and machinery in such defective condition; hence, if you find from the evidence that said Laughlin knew, or by the exercise of ordinary care and prudence would have known, in time to avoid injury, the alleged defects in or about said cars and the bumpers thereof, and of the dangers of attempting to couple them at the rate of speed they were moving, then to attempt the coupling was contributory negligence, and the plaintiff cannot recover in this action."

The tenth instruction given had, as before stated, told the jury that Laughlin had the right to presume that the company was not using cars with bumpers mismatched, "unless he had actual knowledge that they were mismatched, or unless he would have observed such fact in the exercise of ordinary care." Now this fourth instruction asked and refused is but the counterpart of the tenth, so given by the court. That is to say, if Laughlin did have knowledge of the mismatching or defect, or by the exercise of ordinary care and diligence would have known it, then the presumption which the tenth instruction told the jury the law raised would be overcome. The means of knowing by ordinary care is evidence of knowledge.

Having given the tenth, it was but fair and proper to give the fourth asked, in order that the jury might have the law upon both hypotheses, and fully. The doctrine of the fourth instruction was recognized by this court in *Kroy v. Chicago, R. I. & P. R'y Co.*, 32 Iowa, 357, 14 Am. Neg. Cas. 603, *ante*; and it was there said that it "is sustained by an almost unbroken current of authority in this country and in England." See the following cited cases: *Priestley v. Fowler*, 3 M. & W. 1;

Seymour *v.* Maddox, 5 Eng. L. & Eq. 260; Dynen *v.* Leach, 40 Eng. L. & Eq. 491; Griffiths *v.* Gidlow, 3 H. & N. 648; Potts *v.* Plunkett, 7 Am. L. Reg. O. S. 562 (2 B. Ireland); Wilkinson *v.* Fairrie, 1 H. & C. 633 (1); Wright *v.* N. Y. Cent. R. Co., 25 N. Y. 566 (*ubi* too broadly stated); McMillan *v.* S. & W. R. Co., 20 Barb. 453; Hayden *v.* Smithville Mfg. Co., 29 Conn. 548, 13 Am. Neg. Cas. 669; Buzzell *v.* Mfg. Co., 48 Me. 121; Moss *v.*

1. In Priestley *v.* Fowler, 3 M. & W. I, it was held that a master is not liable to an action at the suit of his servant, for an injury sustained by the latter, caused by the breaking down of a carriage in which the servant was riding on his master's business, through a defect in the carriage of which the master was not aware. The declaration in the case stated that the plaintiff was a servant of the defendant in his trade as a butcher; that the defendant desired and directed the plaintiff to go with and take goods of the defendant in a van of the defendant then used by him, and conducted by another of his servants, in carrying goods for him upon a certain journey; that the plaintiff in pursuance of such desire and direction, accordingly commenced and was proceeding and being carried and conveyed by the van, with the goods; and it became the defendant's duty to use proper care that the van should be in a proper state of repair, and should not be overloaded, and that the plaintiff should be safely and securely carried thereby; nevertheless, that the defendant did not use proper care that the van should not be overloaded, or that the plaintiff should be safely and securely carried; in consequence of the neglect of which duties the van gave way and broke down, and the plaintiff was thrown on the ground and his thigh fractured. Held, first, that it was sufficiently to be collected from the declaration that the defendant directed the plaintiff to go in the van; but, secondly, that, even in that case, the action was not maintainable.

In Seymour *v.* Maddox, 5 Eng. L. & Eq. 260, 265, the defendant, proprietor of a theatre, was sued by an actor for an injury suffered through an insufficient lighting of the stage, and an unguarded opening in the floor, into which he fell and was injured. He did not recover in the suit, the court holding that as he was not obliged to enter or remain in the defendant's service if he was not satisfied with the existing condition of things, he voluntarily exposed himself to the danger, of which he had the same knowledge as the defendant himself.

In Griffiths *v.* Gidlow, 3 H. & N. 648, employee injured by fall of tub of water caused by alleged defective appliance, the ruling that a servant cannot recover for injuries if he has the same means of knowledge of danger or defects as the master has, was applied.

And in Dynen *v.* Leach, 40 Eng. L. & Eq. 491, substantially the same doctrine is held, where the employee was hurt by the falling of a weight.

In WILKINSON *v.* FAIRRIE, 1 H. & C. 633, a carman was sent by his employer to the defendants' premises to fetch some goods. After waiting some time, he was directed by a servant of the defendants to go along a passage to a counting house where he would find the warehouseman. The passage was dark, and in going along it he fell down a staircase, and was seriously injured. Held, that the defendants were not responsible, inasmuch as there was no obligation on them to light the passage or fence the staircase.

Johnson, 22 Ill. 642, 14 Am. Neg. Cas. 407, *ante*; Frazier *v.* Penn. Co., 38 Pa. St. 104; Loonam *v.* Brockway, 3 Robt. 74; Fifield *v.* Northern R. Co., 42 N. H. 240; Coombs *v.* Cordage, 102 Mass. 585; Hugh *v.* R. R. Co., 6 La. Ann. 495; McGlynn *v.* Brodie, 31 Cal. 376, 13 Am. Neg. Cas. 425; see also Shearm. & Redf. on Negl. 94; Pierce on R'ys, 297, and 2 Hill Torts, 467. See also Greenleaf *v.* Ill. Cent. R'y Co., 29 Iowa, 14 (14 Am. Neg. Cas. 608, *ante*).

When this case was last before us (see 36 Iowa, 462) an instruction apparently similar to this, but which was, nevertheless, materially different in that it wholly omitted the important element of ordinary care, was held to have been properly refused. The addition of that element and the giving of the tenth instruction by the court, required the giving of this instruction, and rendered its refusal error (1).

The peculiar pertinency of this doctrine to this case is seen, when it is remembered that the evidence, without conflict, shows

I. The MULDOWNEY case has been twice before the Supreme Court (previous to the decision in the case at bar) on appeals by defendant from verdicts and judgment for plaintiff. On the first trial the judgment was reversed in 32 Iowa 176, and the judgment for \$10,000 on the second trial was reversed in 36 Iowa, 462.

The rulings in MULDOWNEY, ADM'X, *v.* ILLINOIS CENTRAL R. R. CO. (June Term, 1871), 32 Iowa, 176, are stated in the syllabus to the official report as follows:

"While the trial court may properly refuse to allow a cause to go to the jury, or may direct a jury as to the verdict, where there is no evidence, or where the essential elements of a cause of action or defense are wanting, such cause is not proper where there is evidence tending in any degree to establish the same.

"Each party has the right to have the jury instructed upon the law of the case, clearly and pointedly, so as to leave no reasonable ground for misapprehension or mistake; and, if the instructions of the court fail thus to

instruct, it is error to refuse one calculated to cure the omission."

In MULDOWNEY, ADM'X, *v.* ILLINOIS CENTRAL R. R. CO., 36 Iowa, 462 (June Term, 1873), the syllabus to the official report states the ruling as follows:

"The reasonable belief of a party that he will not sustain an injury in doing such acts which, but for such belief, would be negligent, does not exonerate him from the charge of negligence.

"In an action for personal injuries — where, after commencing an action to recover for injuries sustained, the plaintiff dies, and his administrator is substituted, he may, as such, recover the amount due his decedent at the time suit was brought, including compensation for his bodily pain and suffering.

"In such action the plaintiff may recover for every thing which was a proper charge against him, and which he was obliged to pay in consequence of the injury, including nursing and use of the house which afforded him shelter.

"It is the duty of a railroad company

that all baggage express, or passenger cars are made higher than freight cars, and that deceased had been for a year or two on the road, and used the same car often, and was skilful.

The defendant also asked the court to instruct the jury as follows, which was refused, viz.: "If you find from the evidence that said cars moved down to the express car where the coupling was to be made, at an unusual and improper rate of speed, that said Laughlin had the power or means (by the use of ordinary care) of regulating or giving to them the usual and proper rate of speed, and that his failure or neglect so to regulate their speed was in whole or in part, the proximate cause of the accident complained of, then the plaintiff cannot recover in this action; and the burden of showing that said cars moved down at the usual and proper speed is upon the plaintiff." The words, "by the use of ordinary care," included in the parenthesis above, were not in the instruction as asked, and for this reason, it is possible that its refusal was not error; but as above it might be given.

The seventh instruction, asked and refused, should have been given. It is as follows: "7. If you find from the evidence that said Laughlin was upon the moving cars which he attempted to couple after they were detached from the locomotive, and that said cars were provided with a sufficient brake, then it was his duty to so regulate their speed that the coupling he attempted to make could be made with ordinary safety; and if he failed to

to exercise reasonable and ordinary care to provide safe and suitable machinery, and it will not be discharged from liability for defects which reasonable and ordinary diligence would have discovered, though it in fact was ignorant of such defects.

"An employee is not under like obligation to resort to means for a discovery of defects. He has a right to presume that his employer has done his duty and complied with the law; hence it is only when he has knowledge of defects in machinery which he continues to use without objection that he is presumed to have waived the defect. It is his *knowledge* and not his *means* of *knowledge* that affects his right to recover.

"Brakemen, baggage-masters, and conductors are not competent to give their opinion as experts respecting the coupling of cars, and as to the danger a brakeman would incur by attempting to make a coupling under certain circumstances.

"When the subject so far partakes of the nature of a science or trade as to require a previous course of study or habit in order to the attainment of a knowledge of it, opinions of experts are admissible.

"On the other hand, if the relation of facts and their probable result can be determined without especial skill or study, the facts themselves must be given, and the jury left to draw conclusions or inferences."

so regulate their speed, and such failure was the proximate cause, in whole or in part, of the accident that produced the injury complained of, then your verdict must be for the defendant."

There were several medical witnesses who testified as to the character and extent of the injuries, the treatment and care or want of it by Laughlin himself. The plaintiff read, in closing the testimony, the deposition of a medical witness taken in behalf of plaintiff. One interrogatory, duly excepted to by defendant, was as follows: "7. Do you think that with different, or in the exercise of greater, care he would probably have recovered?" Ans. The treatment and care of Laughlin was, in my opinion, prudent. I believe a change in either would not have produced any different result." This question and answer put the witness in the place of the jury, to determine the ultimate fact, and it was, therefore, error to admit them. The witness might properly state what facts he knew respecting the treatment and care, and then give his medical opinion upon such facts; or he might be asked his opinion upon an assumed state of facts which the testimony of the other witnesses tended to establish. But such a question as asked was improper, because the witness might base his opinion upon the facts which he assumed, but which the jury might not find, or which had no existence in the case. A medical man's opinion is very competent when the facts upon which it is based are testified to by himself, or by others; but his opinion, without the facts, is not competent, because he is not authorized to find or assume the facts at his pleasure — they are to be found by the jury, and if they do not exist as he assumes them, his opinion may go for naught. The same objection applies to interrogatories 6, 8, 10 and 13. Each should have been excluded.

It is claimed that the verdict is not sustained by the evidence, and we are asked to pass upon this point. Since the judgment must be reversed for other reasons, it might be as well to leave this point untouched. But it may be of importance to both parties upon another trial, that we intimate the light in which the case now appears to us. The fidelity and boldness of the deceased cannot fail to excite the admiration and sympathy of judges as well as jury. But his very boldness which attracts applause, and would surely have won for him great success in life, had he been spared, may, in the law, constitute barriers to his recovery, since boldness is the opposite, almost, of care, upon which the law proceeds.

Two alleged negligent acts caused the injury. One, the mismatching of the bumpers; the other, the too great speed of the cars to be coupled. The first is chargeable to the defendants, and the last to the plaintiff's intestate. The testimony, without conflict, shows that all baggage, express and passenger cars are invariably made higher than freight cars, and this for a controlling reason — the comfort of passengers. When freight cars are loaded the discrepancy in height is increased by the settling of the springs. How this mismatching of bumpers, which comes from invariable construction and natural causes can be called negligence, is, at least, a little inexplicable. While, if the speed of the cars on coming together was too great, and could have been controlled by using ordinary care, negligence is its proper name.

Judgment reversed.

## WAY v. ILLINOIS CENTRAL RAILROAD COMPANY.

*Supreme Court, Iowa, June Term, 1875.*

[Reported in 40 Iowa, 341.]

**KNOWLEDGE OF DEFECT BY EMPLOYEE — PRESUMPTION.** — An employee must make a reasonable use of his senses and if a defect is apparent and patent, and could have been discovered by the exercise of reasonable and ordinary care, in view of the position which the employee occupies, the law conclusively presumes that he possesses the knowledge which reasonable attention would furnish.

**KNOWLEDGE OF DEFECT BY BRAKEMAN — CONTINUANCE IN SERVICE — ASSUMPTION OF RISK.** — Where a brakeman, with knowledge of defects in the machinery and appliances with which he is working, continues in the employment without objection, and without being induced to believe that a change will be made in the same, he assumes the risks, and cannot recover for injuries sustained in the use thereof.

**BRAKEMAN INJURED COUPLING CARS — NEGLIGENCE — BURDEN OF PROOF.** — In an action to recover damages for injuries sustained by a brakeman while coupling cars, the burden is upon the plaintiff to prove that the injury was caused by the negligence of the defendant, and that he (plaintiff) was exercising ordinary care at the time of the injury.

**ORDINARY CARE — INSTRUCTION.** — On the question whether the injured party was exercising ordinary care at the time of the injury, it is proper to charge the jury that they may consider the hazardous nature of the work, and give due weight to the instincts and presumptions which naturally lead men to avoid injury, and preserve their own lives.

**EXPERT EVIDENCE.** — Where the subject of inquiry is such that unskilled persons would be capable of forming a correct judgment respecting it, the opinions of experts upon such matters are incompetent.

**APPEAL** from Dubuque District Court. *Judgment reversed.*

"The plaintiff, as administrator of the estate of W. H. Palmer, alleges that said Palmer, on the 26th day of June, 1871, whilst in the employment of defendant, and without any negligence on his part, was, by the negligence of defendant, caught between a car and the engine, and so injured that he died within a few hours, on account of which plaintiff claims \$20,000. The defendant denies all the allegations of the petition, and alleges that the injury to said Palmer was caused by his own negligence. There was a jury trial, and a verdict and judgment for plaintiff for \$6,000. The defendant appeals."

CRANE & ROOD and H. B. FOUKE, for appellant.

D. E. LYON and SHIRAS, VAN DUZEE & HENDERSON, for appellee.

**Day, J.** — At the time of the injury Palmer had been employed in the yard of the defendant, in the city of Dubuque, about three weeks, coupling cars and assisting to make up trains. He received the injury of which he died, in an attempt to couple a National Line car to the tender of engine number 154. The evidence tended to show that this engine had been in the yard of the defendant about ten years, and that National Line cars came into the yard daily, that they and the tender of the engine number 154 were constructed with deadwoods, which came very close together when the draw-bar failed to enter the draw-head, and that, in consequence, the coupling of a National Line car to the tender in question was very dangerous, and could be accomplished in safety only by standing outside of the deadwoods, a distance of two or three feet from the center of the draw-head.

Defendant asked the court to instruct as follows:

"7. Where an employee has knowledge of the defects or imperfections in the cars or machinery, upon or about which he is employed, or might by the exercise of due care to avoid injury to himself have such knowledge, and does not object thereto, but continues in his master's service, then he cannot sustain an action for an injury caused by such defects or imperfections, but he will be held to have assumed all the risks incident to the use of such defective cars or machinery." The court refused this

instruction, and defendant excepted. In *Muldowney v. Ill. Cent. R. R. Co.*, 36 Iowa, 462, we held that it was not error to refuse to instruct the jury that "when the employee has the same knowledge or means of knowledge, of the defects or imperfections in the machinery or cars, about or upon which he is employed, as his employer has, and does not object thereto, he cannot sustain an action for an injury caused by such defects or imperfections but will be held to have incurred all the risks of the employment incident to the use of such defective cars or machinery." When the same case was again before us (39 Iowa, 615), we held that it was error to refuse to give an instruction the same in all material respects as the seventh instruction above set out, and differing from it only in the arrangement of the words. The difference in the principles announced in the two decisions is quite apparent. A brakeman, although he may have the means and opportunity of doing so, is not required to go around and under the trucks with lantern and hammer, for the purpose of ascertaining whether there be any flaw or crack in a wheel or axle. The company employs parties to perform this duty, and the brakeman has the right to suppose that they will perform it properly, and he is justified in leaving the performance of it to them. At the same time he must make a reasonable use of his senses, and if a defect is apparent and patent, and would have been discovered by the exercise of reasonable and ordinary care, in view of the position which the brakeman occupies, the law conclusively presumes that he possesses the knowledge which reasonable attention would furnish. Any other rule would be opposed to, rather than promotive of, the interests of humanity, as it would encourage the grossest inattention, and would reward it the highest when it produced the profoundest ignorance. See *Muldowney v. Ill. Cent. R. R. Co.*, 39 Iowa, 615, and cases cited; also *Greenleaf v. Ill. Cent. R. R. Co.*, 29 Iowa, 14 (1).

2. The defendant also asked the court to instruct as follows: "14. If a brakeman on a railroad knows that the materials with which he works are defective, and continues his work without objecting, and without being induced by his master to believe that a change will be made, he is deemed to have assumed the risk of such defects; for the continuance of the brakeman in the employment is purely voluntary, and if he so continues without

1. See the *Muldowney* and *Greenleaf* cases, the two preceding cases reported herein.

objection, with knowledge of defects in machinery, he is presumed to have waived the right to insist upon indemnity for injuries resulting from such defects."

" 16. The law presumes the compensation paid a person employed as a brakeman on a railroad is, in part, a consideration for the risks, hazards and dangers ordinarily incident to that service."

" 19. To entitle the plaintiff to recover in this action, the plaintiff must prove to the satisfaction of the jury, or else it must otherwise appear in the evidence to the satisfaction of the jury, that the deceased was injured by the negligence of the defendant, whilst the deceased was observing ordinary care on his part to avoid injury, or did not by his own negligence contribute to the injury." These instructions should have been given. The principles which they involve have been recognized by this court, and are abundantly sustained by authority. See *Kroy v. Chicago, R. I. & P. R'y Co.*, 32 Iowa, 357, and cases cited (1); *Muldowney v. Ill. Cent. R. R. Co.*, 39 Iowa, 615, and authorities cited; *Greenleaf v. Ill. Cent. R. R. Co.*, 29 Iowa, 14, and cases cited. It may be that a full and critical examination of the instructions given would discover that the principles of these instructions were sufficiently embodied in the charge of the court, and that, for the refusal to give these we would not feel inclined to reverse, if no other error existed.

3. The court, in substance, instructed that plaintiff is not required to produce direct and positive testimony, showing just what the deceased was doing at the instant that he received the injury causing his death; that the law requires only the highest proof of which the particular case is susceptible; and that the jury might take into consideration, in weighing the evidence, the hazardous nature of the work in which brakemen are employed, and give due weight to the instincts and presumptions which naturally lead men to avoid injury, and preserve their own lives.

It is objected that this shifts upon defendant the burden of proving the contributory negligence of the deceased. We do not think the instruction vulnerable to this objection. The instincts prompting to the preservation of life are thrown into the scale as evidence, like the presumptions of sanity and innocence. But when the whole evidence is considered, these instincts included.

i. The *Kroy* case is reported on page 603, *ante*.

the plaintiff cannot recover unless the preponderance of the evidence is in his favor.

That a party can recover with less than a preponderance of testimony, and at the same time have the burden of proof, involves an evident contradiction. The principle of this instruction is recognized in *Greenleaf v. Ill. Cent. R. R. Co.*, 29 Iowa, 14. See also *Allen v. Willard*, 57 Pa. St. 347; *C. & P. R. R. Co. v. Rowen*, 66 Pa. St. 399; *Northern Central R. R. v. Geis*, 31 Md. 367.

4. The plaintiff introduced as a witness A. A. Walcott who, amongst other things, testified as follows:

"Q. State whether the National Line cars equipped as that car is, with a tender equipped as that tender is, is that as safely coupled as ordinary tenders? A. No, sir; it is not.

"Q. State whether those tenders, equipped as that is, can be safely used in making couplings with a car equipped as that National Line car is? A. I always considered those National Line cars very unsafe. A man has got to look out very sharp so as not to get caught. Think they are not safe."

Plaintiff also introduced J. M. Way, who testified as follows:

"Q. State whether, in your opinion, a locomotive made like this model, and a car like the National Line car, is safe to couple? A. No, sir; they are not.

"Q. State whether this particular kind is safe or unsafe, for a man to make up a train of cars? A. I call it very unsafe."

All this testimony was objected to as incompetent. It seems to us that it all falls within the principle under which opinions of witnesses were held incompetent in *Muldowney v. Ill. Cent. R. R. Co.*, 36 Iowa, 462. The subject of inquiry, in this case, was not such that unskilled persons would be likely to prove incapable of forming a correct judgment respecting it. Models of the tender and of the National Line car, in question, were exhibited to the jury. Having the relations of the various parts explained the jury could have no difficulty in determining as to the danger which would attend the coupling of them. The matters inquired of are not proper subjects for the opinion of experts.

For the errors considered the judgment is reversed.

BRAKEMAN ON TOP OF CAR COMING IN CONTACT WITH BRIDGE — INSTRUCTION. — In *WELLS v. BURLINGTON, CEDAR RAPIDS & NORTHERN R. R. CO.*, 56 Iowa, 520 (*June Term, 1881*), brakeman fatally injured, judgment for plaintiff in the Butler Circuit Court was *reversed* for error in refusing a requested instruction. The facts and the point decided are stated by BECK, J., as follows:

"The evidence tends to show that the plaintiff's intestate, who, at the time, was a brakeman in defendant's employment, was killed by being knocked from the top of a freight car, where he was in the discharge of his duty, by the timbers of a bridge over which his train was passing. It is shown that the bridge timbers were a little over five feet above the top of the car, while deceased was a man of more than six feet in height. The train was running about eight miles per hour at the time of the accident. The intestate had been employed as a brakeman for more than four years upon that part of the defendant's road whereon was the bridge at which the accident occurred, and other bridges of like construction and height, and, of course, had often passed over them (1).

"The defendant asked the court to instruct the jury to the effect that if they found the service of the intestate as brakeman upon the route where he was employed was hazardous and dangerous on account of the bridge being of insufficient height, of which he had knowledge while employed upon this part of the road, and he continued in defendant's service without objection, the law, in such case is that he assumed the dangers incident to the service resulting from the bridge in question, and his administratrix, therefore, cannot recover on account of his death. The court refused to give this instruction. It should have been given. The rule of the instruction is announced in *Perigo v. Chicago, R. I. & P. R. Co.*, 52 Iowa, 276; *Muldowney v. Ill. Cent. R. Co.*, 39 Iowa, 615; *Kroy v. Chicago, R. I. & P. R. Co.*, 32 Iowa, 357; *Way v. Ill. Cent. R. Co.*, 40 Iowa, 341; *Lumley v. Caswell*, 47 Iowa, 159 (2).

"The principles upon which the rule is based are well stated by DAY, J., in *Perigo v. Chicago, R. I. & P. R. Co.*, 52 Iowa, 276. Referring to the other cases, above cited, he uses this language: 'The doctrine of these cases is that the negligence of the defendant in furnishing defective or improperly constructed machinery and

1. See *Donald v. Chicago, Burlington & Quincy R. R. Co.*, 93 Iowa, 284  
train which passed under a bridge found dead near bridge; appeals by both parties.

2. The cases cited are reported with the Iowa cases in this volume of AM. NEG. CAS.

implements is waived by remaining in the employment without protest or promise of amendment. The waiver of the negligence of the defendant places the case in the same position as though the defendant had not been negligent; and without the negligence of the defendant there can be no recovery. This waiver cannot be affected by the particular situation in which the employee may be placed, or the rapidity and promptness with which he may be required to act at the time of the accident. These questions may very properly bear upon the question of the contributory negligence of the employee, but they can have no bearing upon the question whether the defendant has been guilty of negligence about which the employee has a legal right to complain.' This point of the case demands no further consideration." \* \* \*

BRAKEMAN STRUCK BY ENGINE WHILE COUPLING CARS—"KICKING" CARS—LIABILITY OF RAILROAD COMPANY.—In *PRINGLE v. CHICAGO, ROCK ISLAND & PACIFIC R'Y CO.*, 64 Iowa, 613 (*October, 1884*), brakeman injured by being struck by engine while he was between rails attending to his duty, judgment for plaintiff in the Van Buren District Court was *affirmed*. The facts were stated by BECK, J., as follows: "Plaintiff, while in the employment of defendant as a brakeman, was required, in the discharge of his duty, to assist his co-employees in attaching a car, which stood upon a side track, to the train he was engaged in operating. To do this, it was necessary to draw the car backward from the side track, where it was found, to the main track, and then to move it by a forward motion of the engine through a switch to another side track, thus permitting the train to pass and to be coupled to the car, taking it to the rear. This was done by what is called, in the language of the trainmen, "kicking" (1). The engine is moved forward at sufficient speed to give the car the momentum which will move it to the place where it is desired to leave it, and, while in motion, the engine is uncoupled from the car, and is then stopped, as in this case was the purpose.

i. "Kicking" cars.—*COLLINS v. BURLINGTON, CEDAR RAPIDS & NORTHERN R'Y Co.*, 83 Iowa, 346 (*October, 1891*); employee engaged in defendant's oil house to place and collect switch lights, struck by a car which had been "kicked" onto side track while plaintiff was in act of taking a lamp from the switch stand; judgment for defendant in the Emmet District Court *affirmed*; contributory negligence.

*TOBEY v. BURLINGTON, CEDAR RAPIDS & NORTHERN R'Y Co.*, 94 Iowa, 256 (*April, 1895*); track repairer or section man stepping from track to let an engine pass struck by "kicked" cars on parallel track, run over and left arm crushed; judgment for plaintiff in the Linn District Court *affirmed*; held that "kicking" cars within city at unlawful speed without giving warning is negligence *per se*.

When the engine and car had reached the main track from the side track just mentioned, they were stopped, and plaintiff, as required by his duty, went upon the "brake beam" of the car, at the end next to the engine, for the purpose of drawing the coupling-pin at the proper time, in order to permit the car to be "kicked" upon the side track. After sufficient momentum was obtained, he drew the coupling-pin and gave the signal to stop the engine, and then, waiting until the car had moved sixty or seventy-five feet, and had gained twelve or fifteen feet distance from the engine, he went from the "brake beam" to the track, stepping between the rails, and very near one of them. He was almost immediately struck by the pilot, and his limbs were drawn under it. By clinging to the pilot he prevented his body from being drawn under it, and he was dragged in this position seventy-five feet, when the engine was stopped and backed, and he was thus released from the peril. His duty required him to couple the engine to the train, which had been left on the main track, and to which the engine was to be "backed," after "kicking" the car. The plaintiff testified that, after giving the signal for stopping the engine, and after the car had gone sixty or seventy-five feet, gaining upon the engine twelve or fifteen feet, he believed that the engine had stopped, and therefore he went to the ground, and that he alighted between the rails for the reason that the condition of the track would not permit him to alight outside of them." \* \* \*

CARPENTER, WORKING ON ROUND HOUSE, INJURED BY FALL OF LUMBER PILE.—In *BANDWIN v. ST. LOUIS, KEOKUK & NORTHWESTERN R'Y CO.*, 63 Iowa, 210 (*April Term, 1884*), employee, a carpenter, engaged in building defendant's round house, injured by the falling of a pile of lumber owned by defendant and piled on its premises, judgment for plaintiff in the Lee District Court was *reversed*, special verdict being contrary to evidence. It was held by ADAMS, J., that: "In an action for a personal injury, the plaintiff cannot be deemed to have been necessarily guilty of contributory negligence if the danger might have been seen and avoided if seen. *Greenleaf v. Dubuque & Sioux City R'y Co.*, 33 Iowa, 52. Somewhat depends upon the duty which the injured person was discharging, and somewhat upon the obviousness of the danger."

A subsequent trial of the *BALDWIN* case resulted in verdict and judgment for plaintiff which, however, on appeal, was *reversed* for error in admission of certain evidence. See 68 Iowa, 37 (December Term, 1885).

Another trial of the BALDWIN case resulted in verdict for defendant but plaintiff's motion for new trial was sustained, and on appeal to the Supreme Court this was *affirmed*. See 72 Iowa, 45 (June Term, 1887).

On a subsequent trial of the BALDWIN case there was a verdict and judgment for plaintiff, which the Supreme Court *affirmed*. See 75 Iowa 297 (October Term, 1888).

CAR REPAIRER KILLED WHILE UNDER CAR—RAILROAD COMPANY LIABLE.—In BERRY v. CENTRAL RAILWAY OF IOWA, 40 Iowa, 564 (*June Term, 1875*), plaintiff's intestate, a car repairer in defendant's employ, killed while under car attending to his duties, judgment for plaintiff for \$5,000 in the Marshall Circuit Court was *affirmed* (1). The facts are stated in the opinion by DAY, J., as follows: "The deceased had been in the employment of the defendant about two years. At the time of his death, February 5, 1874, he was foreman of the car repairers. His duty required him to examine the cars to see if they were in bad order, and if so, to mark them. Sometimes a proper discharge of this duty required that he should go under the cars and look up, in order to ascertain their condition. When injured he was under the car on the coal house track, which is a side track or switch, branching from the main track, and extending westward past the coal house, and terminating near the turn table, having no connection at its west end with the main track. It was generally used for the cars employed in hauling coal, though sometimes other empty cars were switched upon it. Most of the work in examining cars and making slight repairs was done on this track, more or less of such work being done there every day. On the morning of the injury Seavers, the master of car repairers, directed Berry to strip the sides from four coal cars on this track, and fix the brakes and oil the boxes, so that the cars could be ready to send to Missouri to haul ties. The yardmaster was notified by both Seavers and deceased that men would be at work that afternoon on the cars on this side track. About two o'clock in the afternoon a flying switch was made. The evidence tends to show that these cars

1. See the following cases relating to injuries to car repairers:

GADROIS v. CHICAGO, MILWAUKEE & ST. PAUL R'y Co., 75 Iowa, 530 (October Term, 1888); car repairer or inspector injured while underneath the car, the train being started without signal to plaintiff; judgment for plain-

tiff in the Cedar Rapids Superior Court reversed for erroneous instruction, etc.

WAY v. CHICAGO & NORTHWESTERN R'y Co., 76 Iowa, 393 (October Term, 1888); car repairer engaged in duties slipping on ice in defendant's yards and injured; judgment on verdict directed for defendant *affirmed*.

were allowed to come from the main track, upon this coal track, and to strike the cars, nine in number, standing thereon, with such violence as to move them nearly the length of a car, causing one of them to pass over the body of deceased, and inflicting injuries of which he died in about twenty minutes." \* \* \*

It was held in the BERRY case, *supra*, that a verdict for \$5,000 was not excessive where the deceased at time of injury was in good health, thirty-two years of age, earning \$2.50 per day, and had a life expectancy of thirty-three years.

## FOLEY v. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY.

*Supreme Court, Iowa, October, 1884.*

[Reported in 64 Iowa, 644.]

**CAR REPAIRER INJURED THROUGH NEGLIGENCE OF CO-EMPLOYEE**  
 — “OPERATION OF RAILWAY” — CONSTRUCTION OF STATUTE  
 — CODE. — A car repairer, whose duty was to repair cars on the track, but who had nothing to do with cars in motion, except to ride on passenger or freight trains to and from the places where his services were required, was not engaged in the operation of a railway within the meaning of section 1307 of the Code, and cannot recover of the company for an injury received while in the discharge of his duty, through the negligence of a co-employee.

*Deppe v. Chicago, R. I. & P. R'y Co., 36 Iowa, 52, distinguished (x).*

**FOREMAN A FELLOW-SERVANT OF CAR REPAIRER.** — In such case, where the negligence causing the injury was on the part of the foreman of the force with which plaintiff was connected, but the foreman had no authority over his men, except to direct them about their work: *Held*, that he was but a co-employee, and not a vice-principal of the company (2).

**DEFECTIVE TRACK — PROXIMATE CAUSE.** — The fact that in such case the repair track on which plaintiff was injured was upon a grade of sixty-three feet to the mile, did not render the company liable on account of negligence, if there was any, in so constructing it, when it is not shown that ‘the grade was the proximate cause of the injury.

**VERDICT — PRACTICE.** — A motion for a verdict notwithstanding the evidence need not be in writing.

(*Syllabus to the official report.*)

**APPEAL** from judgment on verdict directed to be returned for defendant. The facts appear in the opinion. *Judgment affirmed.*

COLE, MCVEY & CLARK, for appellant.

WRIGHT, CUMMINS & WRIGHT, for appellee.

1. See at end of the case at bar Notes of cases bearing on the construction of the statute referring to employees engaged in “operation of railway.” 2. See the preceding case reported as to injuries to car repairers sustained while in performance of duty.

**Rothrock, Ch. J.** — 1. For some time prior to receiving the injury for which the action was brought, the plaintiff had been in the employ of the defendant as a car repairer. His work was on the line of railroad, and not in the machine or repair shops, and the repairs he and the others of the force with whom he worked was required to make were such as could be made upon the track and side tracks of the road.

On the morning of June 9, 1882, plaintiff assisted in making certain repairs on a car standing on the hospital or repair track, in the yards of the defendant at Des Moines, and from there proceeded to repair another car upon the same track. Plaintiff and his co-laborers raised one end of the body of the car from the track with jack-screws, and plaintiff and another man then went under the car at the raised end to make the required repairs, and while there the car moved forward and tilted the jack-screws, and one of the wheels ran into plaintiff's foot and crushed it, so that amputation became necessary. It is alleged that the wheels of the car had not been blocked, and that at the time of the injury an employee was using a bar or lever upon the part of the truck where the plaintiff was repairing. It is claimed by plaintiff that the prying with the lever at that place where it was done was unusual, and that the movement of the car was caused thereby, and that he would not have been injured if the car had been blocked. It also appears that the track upon which the car stood was upon quite a considerable grade.

The main question in the case, as we understand it, is whether the plaintiff was engaged in the service of the defendant in such capacity that he is entitled to recover damages for an injury by reason of the negligence of a co-employee. To determine this question it is necessary to ascertain from the testimony the nature and scope of the plaintiff's duties as an employee of the defendant. The plaintiff testified upon this point substantially as follows: The headquarters of the force of car repairers to which plaintiff belonged was at Des Moines. Plaintiff did no work in shops, but repaired cars on all of the tracks of the company in the yard at Des Moines. He also assisted in repairing cars at other stations along the road, as far west as De Soto, and as far east as Newton. Some weeks he went three or four days to other places than Des Moines, and other weeks not more than one day. He was required to go wherever repairing was to be done, and sometimes the cars were repaired in the trains, and at

other times they would be set off from trains for that purpose. When he went to stations away from Des Moines, he traveled sometimes on a freight and sometimes on a passenger train, and upon passes furnished to him by the foreman of the car repairers. If he traveled on a freight train, he rode in the caboose. He did not go out on any train after June 1, 1882. While going on the trains east or west as car repairer, if there was a hot box broken in the train, plaintiff was required to assist in repairing it, and, if at a station where a defective car was set out, he was required to assist in its repair.

The question to be determined is whether, under section 1307 of the Code, which is the law now in force in reference to the liability of railroad companies for injuries resulting to an employee by reason of the negligence of a fellow-servant, there can be any recovery under the facts in this case.

There was no liability at common law. *Sullivan v. M. & M. R'y Co.*, 11 Iowa, 421. By section 7, chapter 169, of the Laws of 1862, it was enacted that "every railroad company shall be liable for all damages sustained by any person in consequence of any neglect of the agents, or by any mismanagement of the engineer or other employee of the corporation, to any person sustaining such damage." This act was held to be constitutional in the cases of *McAunich v. M. & M. R'y Co.*, 20 Iowa, 338 (1) and *Ney v. D. & S. C. R'y Co.*, 20 Iowa, 347. It was held in those cases that the law was not repugnant to article 3, section 30, of the Constitution, which requires that "all laws shall be general and of uniform operation throughout the State." The ground of these decisions was that "the same liability is extended by the act upon the same terms to all in the same situation;" and in the last-named case it was held that "in connection with railroads the term *employee* applies to conductors, agents, superintendents, and others engaged in operating the road, and the like, and not to contractors or persons building or constructing the roadbed, or laying down the ties and rails." The case of *Deppe v. C. R. I. & P. R'y Co.*, 36 Iowa, 52, was determined under this statute (2). In that case the plaintiff was employed

1. Reported in the Note following the case at bar.

2. In *DEPPE v. CHICAGO, ROCK ISLAND & PACIFIC R'y Co.*, 36 Iowa, 52 (Decem-

ber Term, 1872), laborer, employed in building embankment, injured by falling of earth, judgment for plaintiff for \$7,000, in the Scott District Court, was reversed for misleading instructions.

in shoveling earth on flat cars. The earth was hauled by an engine about two and one-half miles from the bank to where it was used in making an embankment at a bridge. Sometimes plaintiff went with the train to unload, and at other times he remained at the bank to undermine with a pick, etc. While engaged in shoveling on a car the impending bank fell upon him and injured him. Under these facts it was held that the plaintiff's duties were such as to authorize a recovery under the statute. The court said: "The manifest purpose of the statute was to give its benefits to employees engaged in the hazardous business of operating railroads. When thus limited, it is constitutional; when extended further, it becomes unconstitutional." This further language is employed in the opinion in that case: "We have thus stated our views at some length, to avoid misconstruction, for we hold that the court held correctly in refusing the instruction asked, and this because the employment of the

The facts in the DEPPE case were as follows:

"The action was brought to recover damages for injuries to plaintiff caused by reason of the alleged negligence of defendant's employees, while in the employ of defendant and engaged 'as a laborer, loading and unloading a mud train and doing work connected therewith.' Defendant denied its negligence and averred negligence on the part of plaintiff. The testimony of plaintiff, which was in substantial accord with the other testimony in the case, was to this effect: On May 19, 1871, I was working for the defendant about a mile and a half east of Kellogg, shoveling dirt on mud cars. I had been at work there about six weeks. The train consisted of twelve or thirteen cars, and the dirt was used in filling at the bridge west of Kellogg, about two and a half miles from the bank where we got it. Sometimes I went with the train to unload and sometimes remained at the bank to undermine with a pick-axe. I had been with the train to unload during the forenoon of the day I was injured; the bank where I was shoveling was

about twenty feet high above the rock I stood on to shovel from; it was nearly straight up, but slanted back a little until near the top where it projects over a foot or two for a distance of about ten feet along the bank; nobody could say that anything would come down; I had no fear of danger in working there, for nobody could see that. In the morning and at about eight o'clock some men went on the top of the bank with crow-bars to break it down. They got some down, but could not break down any more; I was not on the bank that day and did not know anything of the condition of the dirt there. I saw the men on the top of the bank and spoke to them; and they told me that they could not get any more down; they were at work at the place where the dirt afterward fell on me; after we left for dinner I did not see the main boss; there was another man who acted as boss when he was away; after dinner this man told everybody to go to his car to work; I went to my car and while shoveling up loose dirt, and between one and two o'clock the bank, which was strong ground with black clay, came down all at once upon me, broke

plaintiff was connected with the operation of a railway train. It is true, he was not injured while, or by, operating the train, but neither the act itself nor the constitutional limitation requires us to put this very narrow construction upon it. The plaintiff was employed for the discharge of a duty which exposed him to the perils and hazards of railroads; and although the injuries did not arise from such hazards, they cannot be separated from the employment. *If the plaintiff had been employed exclusively for shoveling or loading the dirt he could not recover, although he might have rode to and from his work on the cars."*

In 1870 this court determined that a railroad company was not liable where the engineer in charge of an engine intentionally and wilfully ran his engine against live stock. *Cooke v. Ill. Cent. R'y Co.*, 30 Iowa, 202.

In April, 1872, the legislature passed another act fixing the liability of railroad companies, which is as follows:

my leg and bruised me so that blood was issued from my extremities. I did not know that anything was loose, and nobody could have seen that anything was loose, nor did anybody call out to me till I was nearly covered; I was taken out directly, and the main boss came up just as I was put on a car to be taken to the house; I was confined to my bed about six weeks; was very sick; my broken leg is shorter than the other, and I will be a cripple for life; I did not say anything to the boss or any other person about that being a bad place to work, and he did not say anything to me about it." was rendered, and defendant appealed."

In considering the statutory liability of railroad companies under the Act of 1862, the court (per COLE, J.) in the DEPPE case, held that while the statute should be limited to employees engaged in the hazardous business of operating the road, it would include the case of an employee who, while engaged on and loading a dirt train, was injured by the falling of earth from an embankment.

In *DEPPE v. CHICAGO, ROCK ISLAND & PACIFIC R'y Co.*, 38 Iowa, 592 (June Term, 1874), laborer, employed in building an embankment, injured by fall of large mass of earth from the foot of a bank, judgment for plaintiff for \$9,000 in the Scott District Court was affirmed. Plaintiff's injury disabled him for life, the bone of his thigh was crushed and he sustained severe internal injuries, and his suffering for several weeks was intense. Held, that the damages were not excessive.

See former decision in the DEPPE case, 36 Iowa, 52, where judgment for plaintiff was reversed for erroneous instructions.

"One of the other witnesses testified to the fact that about eight days before the injury to plaintiff, efforts had been made to break down the bank by blasting with powder; that he was one who was on top of the bank that day and they punched crow-bars down and pried in trying to break down the bank, and that he saw a little crack in the ground. The defendant's witnesses modified these statements somewhat. After the testimony was closed the court instructed the jury, who, upon considering the case, returned a verdict for plaintiff for \$7,000, on which judgment

"Section 1. That every corporation and person owning or operating a railroad in this State shall be liable for all damages sustained by any person in consequence of the *wilful wrongs*, whether of commission or omission, of their agents and employees, when such *wilful wrongs* are in any manner connected with the use and operation of any railroad so owned and operated, on or about which they shall be employed." Chapter 65, Laws of Fourteenth General Assembly.

The present Code was adopted in 1873, and section 1307, is as follows:

"Every corporation operating a railroad shall be liable for all damages sustained by any person, including employees of such corporation, in consequence of the neglect of agents, or by any mismanagement of the engineers or other employees of the corporation and in consequence of the wilful wrongs, whether of commission or omission, of such agents, engineers or other employees, when such wrongs are in any manner connected with the use and operation of any railway on or about which they shall be employed, and no contract which restricts such liability shall be legal or binding."

It will be seen that the two acts of 1862 and 1872 were consolidated into one. Counsel for appellant claim that the union of these two separate and independent acts of 1862 and 1872 did not modify the act of 1862 in any respect but that the liability remains the same as before for acts of mere negligence, and that the words, "*when such wrongs are in any manner connected with the use and operation of any railway,*" in section 1307 of the Code, refer to the "*wilful wrongs*" only, and not to the neglect of agents, or mismanagement of engineers, mentioned in the preceding part of the section. We think it was the evident purpose of the legislature, in adopting this provision of the Code, to fix the liability in all cases, and not to leave the courts to complete the statute by judicial construction, as was done with the act of 1862. If we were to adopt the rule in Deppe's case as governing the first clause of this section, it would be necessary to read the rule between the lines. We think it is not necessary to do that, but that the words "*such wrongs*" may fairly be said to refer to the whole of the preceding part of the section. In a certain sense, all injuries resulting from negligence and mismanagement are wrongs; and it is not to be supposed that the legislature intended that the employment of the injured party should be

different when he claims damages by reason of negligence from what it is when the wrong done him is wilfully done.

With the exception of Deppe's case, all the actions in which this court has determined that railroad companies are liable in this class of cases are those where the injury was received by the movement of cars or engine upon the track. See *Frandsen v. R'y Co.*, 36 Iowa, 372; *Schroeder v. R'y Co.*, 47 Iowa, 375; *McAunich v. R'y Co.*, 20 Iowa, 338; *McKnight v. R'y Co.*, 43 Iowa, 406; *Potter v. R'y Co.*, 46 Iowa, 399; *Smith v. R'y Co.*, 59 Iowa, 73; *Malone v. R'y Co.*, 61 Iowa, 326, and other cases (1).

We think, however, that the rule in Deppe's case, *supra*, is not materially different from the rule as now fixed by statute. This court has not recognized any distinction in determining cases of this character. See *Malone v. R'y Co.*, and *Smith v. R'y Co.*, *supra*. In that case the rule is recognized as the same, and Deppe's case was discussed as though the rights of the parties were the same. In that case it is said: "Deppe was a trainman; he was part of a gang who worked with a train, and part of his duties were peculiar to the operation of a railroad, as unloading cars in a train standing upon a track and attached to an engine."

Applying this test to the evidence in the case at bar, we think the plaintiff does not come within any rule which has been adopted by this court. It is true, he was at times required to take passage upon the caboose of a freight train, or in the coach of a passenger train, to ride to his work, but he was not required to engage in his employment at points where there were moving trains. It was held in Deppe's case, that, "if the plaintiff had been employed exclusively in shoveling or loading the dirt, he could not recover, although he might have ridden to and from his work on the cars." That is about as near as plaintiff in this case brings himself, by his evidence, to the perils attending the operation of the road. Riding to and from his work when required to go to points away from Des Moines is about all the danger to which he was exposed from the operation of the road. He was not a trainman, and had nothing to do with the running of trains. Deppe was connected with the train upon which he worked, not as a brakeman, fireman, engineer or conductor, but as one of the force necessary to make up the crew of a construction train.

II. It is next claimed by counsel for appellant that there was

1. See these cases in the note following the case at bar.

evidence tending to show that the plaintiff was injured by the negligence of a superior. It is insisted that the man Gilligan, who worked the lever and moved the car, was a vice-principal, and that the defendant is liable for his negligence at common law. We do not think there was any evidence upon which such a claim can be founded. It is true, Gilligan was foreman of the force with which the plaintiff was connected. But it is not shown that he had any authority over the men under his charge, except to direct them about their work. It does not appear that he had authority to employ or discharge his men, and it is shown that he labored with his men as one of the gang, and was engaged in such labor when the plaintiff received his injury. *Houser v. Chicago, R. I. & P. R'y Co.*, 60 Iowa, 230 (1), and *Peterson v. Whitebreast Coal & Mining Co.*, 50 Iowa, 673 (14 Am. Neg. Cas. 587, *ante*).

III. It is claimed by counsel that there was evidence tending to show that the hospital or repair track where the injury occurred was negligently constructed, and that the defendant is liable for negligence in failing to furnish a proper track upon which to make the repairs.

It is shown in the evidence that the track was constructed upon a grade of about sixty-three feet to the mile. But there is not one word of testimony as to whether the grade was unusual, or whether the surface of the earth was such as to admit of different construction. Indeed, it is not shown that the grade of the track was the proximate cause of the injury. If there was any negligence in this respect, it consisted in a failure to block the wheels of the car. It appears that blocks were used for this purpose while repairing the other car on the same track.

IV. Lastly, it is claimed that the motion to direct the jury to return a verdict for the defendant was not in proper form. The motion was oral. It is urged that it should have been in writing, and should have set out the facts and conclusions which the defendant admitted. We think that a written motion is not required, and that such has not been the practice. The question to be determined by the court upon the motion was whether there was any evidence introduced which tended to prove the issues in the case. It surely was not necessary to set out the evidence, or the facts proved, in a motion. The court in such cases is presumed to know what testimony has been introduced, and

1. Reported in the note following the case at bar.

the ruling can be as intelligently made by an oral motion as by a written one. We think the court did not err in directing a verdict for the defendant.

Judgment affirmed.

NOTES OF IOWA CASES, RELATING TO INJURIES TO RAIL-ROAD EMPLOYEES, IN WHICH THE CONSTRUCTION OF THE STATUTE, CODE, § 1307, WAS INVOLVED.

**Construction of railroad statute.**

The cases cited in *Foley v. Chicago, Rock Island & Pacific R'y Co.*, 64 Iowa, 644 (preceding case reported), relating to the constitutionality or the construction of the Railroad Statute, Code, section 1307, are reported in the following note, together with additional cases bearing on the statutory liability of railroad companies for injuries to employees.

The statute referred to is set out in the *FOLEY* case, *supra*, but for convenience of reference the same is given in this note, which is as follows:

**The statute.**

Code, section 1307: "Every corporation operating a railway shall be liable for all damages sustained by any person, including employees of such corporation, in consequence of the neglect of agents, or by any mismanagement of the engineers or other employees of the corporation, and in consequence of the wilful wrongs, whether of commission or omission, of such agents, engineers or other employees, when such wrongs are in any manner connected with the use and operation of any railway on or about which they shall be employed, and no contract which restricts such liability shall be legal or binding."

**Cases within the statute.**

*Brakeman injured in collision of train with animals on track.*

In *McAUNICH v. MISSISSIPPI & MISSOURI R. R. Co.*, 20 Iowa, 338 (June Term, 1866), plaintiff's intestate, a brakeman in defendant's employ, fatally injured in a collision of the train with an ox team on the track, negligent act of engineer in running the train in the night-time without a headlight being alleged, whereby the engine and three freight cars, between two of which cars the deceased was riding, was derailed, judgment for plaintiff in the Cedar District Court was *reversed*, the verdict being contrary to the evidence and the instruction of the court. The deceased was riding between the cars against the rules of the company, and the proximate cause of the injury was his own negligence, for which there could be no recovery, on which point the trial court charged the jury. The liability was founded upon the statute, section 7, chapter 169, Acts 1862, relating to duties of railroad companies, and the constitutionality of the statute was fully discussed. The section referred to is as follows: "Every railroad company shall be liable for all damages sustained by any person, including employees of the company in consequence of any neglect of the agents, or by any mismanagement of the engineer or other employees of the corporation to any person sustaining such damage." The statute was held not to be in

conflict with the Constitution requiring all laws of a general nature to be of uniform operation.

*Section hand injured in collision of hand car with train.*

In *FRANDSEN v. CHICAGO, ROCK ISLAND & PACIFIC R'y Co.*, 36 Iowa, 372 (June Term, 1873), section hand riding on hand car injured in collision with train, judgment for plaintiff for \$4,916.66 in the Crawford Circuit Court was affirmed. The Court (per COLE, J.) stated the facts as follows: "The plaintiff is a Dane and aged 42; he had been in the employment of the defendant as a section hand a year and a half before the accident, which occurred February 7, 1870, about two miles east of Shelby, a station on defendant's road. On the morning of that day the plaintiff and three other men, besides the section boss—five in all—with their tools, started east with and rode on a hand car about two miles, crossing a bridge, between which and a cut, about a half mile distant, they stopped and picked up some skivers and put on the car. The passenger train going west was then due, and the section boss so stated (the train was, in fact, about two minutes behind time), but he directed the men to proceed with the hand car east, which they did, all being on the car, until they reached near the middle of the cut, which was about fifteen feet deep and three hundred feet long, both the entrance and exit being made on a curve. A part of the witnesses fix the place reached entirely west of the cut, and upon this there is conflict. At the place reached, whether it was in the cut or west of it, all of the men heard the train before they could see it, and by direction of the boss at once stopped their hand car, which weighed about 500 pounds, and commenced to lift it off the track as the train going west, at from twenty-three to twenty-five miles an hour, came in sight about 250 feet distant around the curve and whistled; just at this moment one of the men slipped and fell on the track, and another let go the hand car, then about one-third off, to pull the fallen man from the track; the boss and the other two men, the plaintiff being one, made a further effort to remove the hand car and could not; in the meantime the train approached so near that, at the direction of the boss, all the men fled, leaving the hand car on the track; all, except the plaintiff, ran east and were unharmed, while he, being at the west end of the hand car, ran west, in the direction the train was going, and when the engine hit the hand car it knocked one of the wheels off and against the plaintiff with such force as to break one of his legs and one arm, and from which he was confined to his house for months, and is probably a cripple for life." \* \* \*

The court held that the verdict was supported by the evidence, as also the question of a settlement of the claim and payment of it in full, and the finding of the jury would not be disturbed.

Continuing, the court said: "The second question in order, and upon which counsel bestowed much consideration, is, whether the employment in which this plaintiff was engaged comes within the provisions and the constitutional limitations upon them of our statute making railroad companies liable to their employees for injuries resulting from the negligence of their co-employees. Section 7, ch. 169, Laws 1862, and Const., art. 3, § 30. The constitutionality of that act, within certain limitations, has been already adjudicated by this court. See *McAunich v. Mississippi & Mo.*

R. R. Co., 20 Iowa, 338; Ney *v.* D. & S. C. R. Co., 20 Iowa, 347, and Deppe *v.* Chicago, R. I. & P. R. R. Co., 36 Iowa, 52. Under these rulings is the plaintiff within the statute? Acknowledging the cogency and power of the very clear and able argument made at bar by the senior counsel for appellant, we are, nevertheless, constrained, but with much of doubt, to hold that he is. In view of all the facts and the entire argument, the plaintiff was, it seems to us, in the language of the first case above cited, 'engaged in the business of a railroad company,' or, in the language of the second, he was 'engaged in operating the road and the like,' or, in the language of the last case, his 'services related to the perilous business of railroading.' We do not know that any argument we could make would add force or satisfaction to our conclusion." \* \* \*

*Foreman of construction crew struck by falling object..*

In Houser *v.* CHICAGO, ROCK ISLAND & PACIFIC R. R. Co., 60 Iowa, 230 (December Term, 1882), it was held (as per syllabus to official report) that "an employee of a railroad company, who is foreman of a crew, with the power to direct the men under him in their work, and to hire and discharge them at will, is a co-employee with the men under him, in contemplation of section 1307 of the Code, and may recover of the railroad company for injuries received in the course of his employment by reason of the negligence of the men in his crew."

The facts in the Houser case, *supra*, are stated by Rothrock, J., as follows: "The plaintiff was foreman of a crew of men employed by the defendant in the construction and repair of bridges. They operated a pile driver, loaded timber upon cars, and conveyed the same on defendant's road. On the 16th day of November, 1880, the plaintiff and the men under his charge were ordered to proceed to a railroad bridge over Cedar Creek, in Jefferson county, and load some timbers upon cars and remove them to another place. The timbers had before that been taken out of the bridge, and were lying upon the ground below. A flat car was placed upon the bridge, upon which they loaded the timbers, and the distance from the top of the car down to the ground was about eighteen feet. In order to raise the timbers to the car, a pine stick twenty feet long and six by eight inches was erected perpendicularly, resting on two blocks, each twelve by twelve inches. This piece of pine timber, when thus used, is called a ginpole. The bottom or lower end of it was lashed with a rope to one of the pilings of the bridge, and about seven or eight feet above an iron bolt was put through one of the cap timbers of the bridge into and through the ginpole, and the end of the bolt thus driven through was secured by a nut. The pole, being thus fastened, passed up near the flat car, and upon the top of the pole a pulley was affixed, through which a rope passed to a snatch block at the opposite side of the car, and thence to the pile driver, where the steam power was applied to the rope to raise the timbers to the car. The work had been so far completed that it was necessary to remove the ginpole to the other side of the bridge. The last two or three timbers raised had been placed upon the car, but had not been piled up on the other timbers. At this time the plaintiff gave orders to some of the men to take down the ginpole. In so doing they unlashed the pole at the lower end, and one of the employees, named Woodford, drove the bolt back as

far as he could with a maul, and then, instead of taking another bolt and using it as a follower to drive out the bolt, he changed his position and struck the pole with the maul and knocked it off the bolt, and it slipped off the blocks on which it rested and fell in a slanting direction, and as it fell an iron bolt or pin through the top of the pole where the pulley was fastened caught plaintiff by the neck and threw him from the flat car to the ground, breaking both his ankles and inflicting injuries upon him. The plaintiff, as foreman of the crew, had full control over the men under his charge, and they were required to obey his instructions. He had the power to employ and discharge them, or any of them, without consultation with, or direction from, any other agent or officer of the defendant; and at the time and place where he received his injury he had full charge of the work, and, in respect to doing the same, was not under the orders of any other person." \* \* \* Judgment for plaintiff in the Scott Circuit Court affirmed.

*Railroad detective struck by train.*

In *PYNE v. CHICAGO, BURLINGTON & QUINCY R. Co.*, 54 Iowa, 223 (June Term, 1880), judgment for defendant on demurrer to complaint in the Clarke District Court was reversed, the case being stated in the syllabus to the official report as follows: "The plaintiff alleged that he was employed by defendant, a railroad company, as a private detective, and that while walking upon the track of defendant's road in the performance of his duties as such employee, and in obedience to the orders of his principal, he was injured, without negligence on his part, through the negligence of the engineer of a passing train. Held, on demurrer, that the facts alleged were sufficient to bring the plaintiff within the provisions of section 1307 of the Code, and entitle him to maintain an action for injuries received through the negligence of a co-employee."

*Railroad employee struck by revolving crank.*

In *NELSON v. CHICAGO, MILWAUKEE & ST. PAUL R'Y CO.*, 73 Iowa, 576 (December Term, 1887), plaintiff, engaged in operating a ditching machine upon a moving train of cars, struck by a revolving crank, the injury being caused by negligence of a co-employee, it was held that such employment was within the meaning of section 1307 of the Code, making railroad company liable for injury to an employee through the negligence of a co-employee. Judgment on verdict directed for defendant in the Scott District Court was reversed, it being error to give such direction where there is a conflict in the evidence on the issues involved.

A subsequent trial in the *NELSON* case, *supra*, resulted in judgment for plaintiff, which, on appeal, was affirmed by the Supreme Court. See 77 Iowa, 405 (May Term, 1889).

*Snow shoveler falling from caboose through bridge.*

In *SMITH v. HUMESTON & SHENANDOAH R'Y CO.*, 78 Iowa, 583 (October Term, 1889), it appeared that plaintiff was employed as a snow shoveler to clear defendant's track of snow obstructions, his duties requiring him to ride from one obstruction to another in defendant's caboose. At the time of the accident it was dark and the train had been standing for some time, the caboose being on a bridge, which fact was not known to plaintiff.

Having occasion to attend to a personal want, he stepped out upon the platform of the caboose, which was covered with snow and ice, and fell to the ground under the bridge, his right leg being severely injured. The headlight of the engine, which was next to the caboose, blinded plaintiff for the moment as he stepped from the caboose, so that he could not see the bridge. The trial court withdrew the case from the jury and rendered judgment for defendant. On appeal the Supreme Court reversed the judgment of the Wayne District Court, holding that there was evidence from which the jury might have found for plaintiff. It was also held that plaintiff was an employee engaged in the operation of the railroad within the meaning of section 1307 of the Code. Citing and reviewing numerous cases defining who are employees entitled to recover under such statute, namely, *Deppe v. R'y Co.*, 36 Iowa, 52; *Malone v. R'y Co.*, 65 Iowa, 417; *Luce v. R'y Co.*, 67 Iowa, 417; *Smith v. R'y Co.*, 59 Iowa, 74; *Stroble v. R'y Co.*, 70 Iowa, 559; *Pyne v. R'y Co.*, 54 Iowa, 225; *Frandsen v. R'y Co.*, 36 Iowa, 372; *Pierce v. R'y Co.*, 73 Iowa, 142; *Nelson v. R'y Co.*, 73 Iowa, 576; *Foley v. R'y Co.*, 64 Iowa, 644; *Potter v. R'y Co.*, 46 Iowa, 400; *Schroeder v. R'y Co.*, 41 Iowa, 344 (which cases are reported in this volume of Am. Neg. Cas.).

#### *Section foreman struck by train.*

In *HADEN v. SIOUX CITY & PACIFIC R'Y CO.*, 92 Iowa, 226 (October, 1894), section foreman working on track struck by train, judgment for plaintiff in the Harrison District Court was affirmed. The Supreme Court said: "Now, take it as an established fact that the brakeman saw plaintiff step on the track, as he says he did, and then take the fact, as the jury was warranted in finding it, that the section of the train was at that time 400 feet away; and, even though it was negligence for the plaintiff to step on the track without looking to see if the other part of the train was approaching, the jury might conclude that the accident could have been avoided by due care on the part of the brakeman after he discovered the danger to plaintiff. If so, under a well recognized rule, there could be a recovery." \* \* \* "A person engaged in keeping in repair the track of a railroad for the present operation of its trains is engaged 'in the business of operating a railroad,'" within Code, section 1307. Citing *Malone v. R'y Co.*, 65 Iowa, 417.

The former decision in the Haden case is reported in the supplement to 99 Iowa, and is also reported in 48 N. W. 733. See *HADEN v. SIOUX CITY & PACIFIC R. R. CO.*, 99 Iowa, 735 (December decisions, 1896).

Under Code, § 3653, the Carlisle tables, contained in the Encyclopædia Britannica, may be admitted in evidence without preliminary proof. *HADEN v. SIOUX CITY & PAC. R. CO.*, 99 Iowa, 735.

#### *Water boy killed by car leaving track and falling on him.*

In *KEATLEY, ADM'R v. ILLINOIS CENTRAL R'Y CO.*, 94 Iowa, 685 (May, 1895), water boy in defendant's employ killed by a car leaving the track and falling on him, judgment for plaintiff in the Dubuque District Court was affirmed. Plaintiff's intestate was a water boy with a stone gang engaged in building a retaining wall along the embankment adjacent to an unfinished bridge on which the iron gang was working. On the day of the accident

the decedent was standing on a derrick platform used in building a side wall, when a freight train crossing the uncompleted bridge was derailed and a car fell over on the derrick platform and killed the plaintiff's intestate. It was held that recovery could be had under Code, § 1307, for injury connected with "the use and operation of a railroad."

*Character of employment question for jury.*

In *SCHROEDER v. CHICAGO, ROCK ISLAND & PACIFIC R'Y Co.*, 41 Iowa, 344 (December Term, 1875), employee engaged in tearing down an old bridge across the river, directed by bridge superintendent to go upon a certain train of cars loaded with timbers, which were being removed, for the purpose of unloading them, thrown off the cars while the same were in motion, the negligence charged being careless loading of timbers which fell off, judgment for plaintiff in the Scott Circuit Court was *reversed* for error in charging as to character of employment under the statute as matter of law, when the same was a question of fact for the jury.

A subsequent trial of the *SCHROEDER* case resulted in judgment for plaintiff, which, however, on appeal, was *reversed* by the Supreme Court on the question of the right of defendant to require the plaintiff, under direction of the court, to submit to a physical examination for purpose of ascertaining the character and extent of his injuries. See 47 Iowa, 375 (December Term, 1877).

In the *SCHROEDER* case, 47 Iowa, 375, it was held (as per syllabus to the official report) as follows: "If a person is required in the course of his employment by a railroad company to go upon a train, and he does so in the discharge of his duty, he is to be regarded as being engaged in its operation, notwithstanding his employment may not be connected with the running of its trains, and the company is liable to him for injuries resulting from the negligence of a co-employee."

On the question of the right to require a physical examination of the injured party, the court (per BECK, J.) discussed the points very fully, and the rulings are stated in the syllabus to the official report, as follows:

"In an action for damages for personal injuries, the plaintiff may be required by the court, upon a proper application therefor by the defendant, to submit his person to an examination for the purpose of ascertaining the character and extent of his injuries.

"1. A party to an action has the right to demand the administration of exact justice, and, to this end, that evidence essential thereto and within the control of the court shall be produced.

"2. It is within the power of the court to compel an examination since the plaintiff is before it as a witness, and upon his refusal he may be treated as recusant.

"3. The courts have authority to direct an examination in actions of divorce on the ground of impotency.

"4. Plaintiffs are permitted in actions for personal injuries to exhibit their wounds or injuries to the jury."

**Cases not falling within the statute.**

*Laborer in machine shops knocked down by a locomotive wheel.*

In *POTTER v. CHICAGO, ROCK ISLAND & PACIFIC R. R. Co.*, 46 Iowa, 399

(June Term, 1877), laborer in machine shops of defendant injured by being knocked down by a locomotive driving wheel which he and other employees were moving by hand, judgment for plaintiff in the Dallas Circuit Court was *reversed* for failure to state all the issues made by the pleadings in the charge to the jury. As to the statutory liability of railroad companies the court (per SEEVERS, J.) said:

"It has been held by this court that the change made in the common law by the statute extends 'no further than to employees engaged in the business of operating railroads, and not to all persons employed by the corporation, without regard to their employment. \* \* \* Corporations owning and operating railways may engage in other business which may be within the scope of their organization, yet not at all, or very remotely, connected with the use of their roads. \* \* \* Their occupation does not expose them to the hazards incident to railways. The statute is not designed for their protection and benefit.' *Schroeder v. Chicago, R. I. & P. R. Co.*, 41 Iowa, 344.

"In the present case the plaintiff was in no manner connected with the operation of a railroad; and whether the defendant is liable or not must depend not on the statute, but on the principles of the common law as held to exist in this State. The fact that the shop is owned and controlled by a railroad corporation is entirely immaterial. The liability of the defendant must be measured by the same rules as if the shop was owned and conducted by a natural person. The common law on this subject was declared in *Sullivan v. M. & M. R. R. Co.*, 11 Iowa, 421, to be that the employer was not liable for injuries sustained by an employee through the negligence of a co-employee." \* \* \*

#### *Section hand loading car — Negligence of fellow-servant.*

*SMITH v. BURLINGTON, CEDAR RAPIDS & NORTHERN R'Y CO.*, 59 Iowa, 73 (June Term, 1882); section hand engaged in loading a car injured through negligence of a fellow-servant; judgment for defendant in the Fayette District Court *affirmed*; the case did not fall within Code, § 1307, it not being shown that the employment was connected with "the operation of the railway."

#### *Engine wiper injured by fall of door of roundhouse.*

In *MALONE v. BURLINGTON, CEDAR RAPIDS & NORTHERN R'Y CO.*, 61 Iowa, 326 (June Term, 1883), employee, an engine wiper, etc., while endeavoring to close a heavy door to a roundhouse which was obstructed with an accumulation of ice and snow, injured by the fall of the door, caused by an employee prying it with an iron bar, which lifted the door from its hinges, judgment for plaintiff in the Linn District Court was *reversed* on the ground that the injury was not "in any manner connected with the use and operation of the railway," under section 1307 of the Code.

A subsequent trial in the *MALONE* case resulted in a verdict being directed by the trial court for defendant, which, on appeal to the Supreme Court, was *affirmed*. *MALONE v. BURLINGTON, C. R. & N. R'Y CO.*, 65 Iowa, 417 (December Term, 1884), the ruling being similar to the former decision.

The case of *Deppe v. Chicago, R. I. & P. R'Y CO.*, 36 Iowa 52 (14 Am. Neg. Cas. 632, *ante*), was distinguished from the *MALONE* case, *supra*, in the decisions in the latter case.

*Employee hoisting coal struck by crane.*

In *LUCE v. CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA R'Y CO.*, 67 Iowa, 75 (September Term, 1885), employee in defendant's coal house, engaged in hoisting coal for purpose of filling a car, injured by the crane striking his arm, owing to the negligent management of the crane by a co-employee, judgment for plaintiff in the O'Brien District Court was *reversed*, it being held that recovery could not be had, the injury not being in any manner connected with the use and operation of the railroad. Following *Foley v. Chicago, R. I. & P. R'Y CO.*, 64 Iowa, 644, and *Malone v. Burlington, C. R. & N. R'Y CO.*, 61 Iowa, 326, and 65 Iowa, 417.

*Laborer struck by heavy stone—Fellow-servant rule.*

See also, on this point, *MATSON v. CHICAGO, ROCK ISLAND & PACIFIC R'Y CO.*, 68 Iowa, 22 (December Term, 1885), where the cases cited in the preceding paragraph were followed. In the *MATSON* case the plaintiff was a member of a construction gang, his duties requiring him to ride upon and work about defendant's cars and tracks, but his injury was caused by a co-employee throwing a heavy stone upon his hand while engaged in placing stones under the ends of the ties. Judgment sustaining demurrer to complaint *affirmed*.

*Employee hauling coal injured by defective platform stairs.*

*STROBLE v. CHICAGO, MILWAUKEE & ST. PAUL R'Y CO.*, 70 Iowa, 555 (December Term, 1886); employee engaged with another employee in elevating coal to a platform for delivery to tenders of engines, injured while descending stairs of platform, the same giving way owing to defect in one of the planks; judgment for plaintiff in the Winneshiek District Court *reversed* for erroneous instructions; employment not within terms of the statute as to "use and operation of a railway."

*Engine dispatcher assisting machinist to put a spring into an engine.*

In *HATHAWAY v. ILLINOIS CENTRAL R'Y CO. ET AL.*, 92 Iowa, 337 (October, 1894), engine dispatcher in defendant's roundhouse injured while engaged with another employee in putting a spring into one of defendant's engines, judgment on verdict directed for defendant in the Lyon District Court was *affirmed*. The syllabus to the official report states the case as follows: "A machinist in the employ of a railroad had authority to ask other employees to assist him on occasions when he could not alone do some particular piece of work. On one such occasion, in setting a spring, a piece of rail was used where ordinarily a square bar was used. The rail was more likely to slip. It did slip and injure one of said helping employees. This could have been prevented had wood blocks, of which there were a number in the shop, been used as wedges. Held, that the fact that the machinist was negligent in this one instance, by failure to use the wedges, did not make it negligence to employ him. The work was not connected with the operation of a railroad. The machinist was not a vice-principal, and the railroad was not responsible for his negligence. It was not necessary to tell the employees of the danger of said work, as they knew it themselves." Opinion rendered by *GIVEN, J.*

**Receiver is included under the terms of the statute.**

In *SLOAN v. CENTRAL IOWA R'Y CO.*, 62 Iowa, 728 (June, 1883), it was held that "a receiver, who is operating a railroad under the appointment and direction of a court, is included under the terms 'persons owning or operating railways,' in contemplation of sections 1278 and 1307 of the Code; and such receiver, or rather the property in his hands, is liable for the claim of an employee for injuries received through the negligence of co-employees." It was also held that there was a right of recovery against railway company taking from a receiver the railroad burdened with the liability for injuries to an employee. In this case plaintiff, employed by a conductor to take the place of the regular brakeman on the train, was injured while attempting, under orders of conductor, to cut off the four rear cars of the train while it was in motion, the train being started by engineer before requisite signal was given, and plaintiff was thrown off car and run over. Judgment for plaintiff in the Poweshiek Circuit Court *affirmed*.

**CONSTRUCTING ENGINEER, RIDING ON WRECKING TRAIN, INJURED IN DERAILMENT OF TRAIN — RAILROAD COMPANY LIABLE.** — In *MELOY v. CHICAGO & NORTHWESTERN R'Y CO.*, 77 Iowa, 743 (*May Term, 1889*), constructing engineer, riding on tool car attached to wrecking train, injured in derailment of train, his left leg being crushed, judgment for plaintiff for \$10,000 in the Cedar Rapids Superior Court was *affirmed*. HUBBARD, CLARK & DAWLEY, appeared for appellant railway company; WARD & HARMAN and MILLS & KEELER, for appellee. The facts of the case are stated in the opinion by ROBINSON, J., as follows: "In the summer of 1884 plaintiff was in the employment of defendant, and was engaged as a civil engineer in superintending the laying of the track on a new line of railway which defendant was then constructing from Belle Plaine to What Cheer. He was not required to see that the track was kept in good condition after it was laid. On the third day of August, of the year named, the track had been laid from Belle Plaine to a point about thirty-five miles south. On that day plaintiff, who was in Belle Plaine to visit his family, was ordered to go to the front with a wrecking train, which was going down to assist in replacing on the track a derailed engine. The train consisted of an engine, which was run backwards, pushing the tender and pulling the cars; a wrecking car, with derrick, next to the engine; an old way car, fitted up and used as a tool car, next to the wrecking car; three flat cars loaded with steel rails; three loaded with ties; and at the rear end a box car, fitted up and used as a way car. The plaintiff, with other employees of defendant, rode in the tool car. At a point about twenty-one miles south of Belle Plaine the engine, derrick car, tool car and forward trucks of the first car of rails left the track,

and the tool car was badly broken. At the moment of the accident plaintiff was standing on a platform of the tool car, whither he had gone, as he states, for the purpose of jumping from the train, under the belief that an accident was imminent. He was caught between two cars in such a manner that his left leg was crushed, making amputation necessary. Other injuries were also received. The evidence on the part of plaintiff tends to show that the track where the accident occurred was in bad condition at the time; that it was laid through a deep cut, over wet, soft earth; that it had settled unevenly, and was out of line; that the condition had been made worse by a storm of rain the night before; and that at the time of the accident the train was running from twelve to seventeen miles an hour. The way car did not leave the track. Plaintiff charges that the train was negligently run at too high a rate of speed over a track known to defendant to be in a dangerous condition, by an inexperienced and incompetent engineer; and that he did not contribute to the injuries of which he complains. The jury found specially that defendant was negligent in maintaining and repairing the roadbed and track at the time and place of the accident; that the train in question was "running at a dangerous and negligent rate of speed, considering the condition of the roadbed at that place and time;" and that plaintiff was not guilty of contributory negligence. The amount of the verdict and judgment was \$10,000. An opinion was filed in this cause on a former submission, but a rehearing was granted on the petition of appellant, and the cause again submitted." \* \* \*

#### Notes of cases relating to injuries to locomotive engineers.

##### *Engineer injured in collision.*

**YORK, ADM'R v. CHICAGO, MILWAUKEE & ST. PAUL R'Y CO.**, 98 Iowa, 544 (May, 1896); engineer fatally injured in collision between two freight trains; disobedience of rules; contributory negligence; judgment on verdict directed for defendant in the Jones District Court *affirmed*; the case of **Haas v. Chicago, M. & St. P. R'y Co.**, 90 Iowa, 259, distinguished.

**LAIRD v. CHICAGO, ROCK ISLAND & PACIFIC R'Y CO.**, 100 Iowa, 336 (December, 1896); engineer injured in collision; judgment for plaintiff in the Guthrie District Court was *reversed*; erroneous instruction on measure of damages, and error in admitting railroad rules on the question of speed of trains.

##### *Engineer injured in derailment of train.*

In **KNAPP v. SIOUX CITY & PACIFIC R'Y CO.**, 65 Iowa, 91 (October Term, 1884), locomotive engineer injured in derailment of train, his right arm being broken, defective track being alleged, judgment for defendant in the Pottawattamie District Court was *reversed* on question of practice; assumption of risk; proximate cause.

A subsequent trial in the KNAPP case resulted in verdict and judgment for plaintiff for \$9,500, which was *affirmed* by the Supreme Court. 71 Iowa, 41 (March Term, 1887).

In WORDEN, ADM'R v. HUMESTON & SHENANDOAH R'Y Co., 72 Iowa, 201 (June Term, 1887), engineer killed in derailment of engine, due to alleged defective track, judgment for plaintiff in the Page Circuit Court was *reversed*; declarations of section foreman at time other than that of accident not admissible as part of *res gestæ*; erroneous instructions, etc.

A subsequent trial of the WORDEN case resulted in verdict and judgment for plaintiff, which, on appeal, was *affirmed*. See 76 Iowa, 310 (October Term, 1888).

SCAGEL, ADM'R v. CHICAGO, MILWAUKEE & ST. PAUL R'Y Co., 83 Iowa, 380 (October, 1891); engineer killed in derailment of train while passing over bridge crossing stream, the ice in the stream having lodged against the bridge, and when struck by the engine the rails were loosened; judgment for plaintiff in the Cerro Gordo District Court for \$6,500 *affirmed*.

In the SCAGEL case, *supra*, Johnson's New Universal Encyclopædia, a standard work upon matters of science and art, was held competent evidence on life expectancies.

*Engineer coming in contact with water-crane near track.*

In GOULD, ADM'x v. CHICAGO, BURLINGTON & QUINCY R'Y Co., 66 Iowa, 590 (June Term, 1885), engineer killed, judgment for plaintiff in the Des Moines Circuit Court was *reversed* for erroneous instructions. The facts are stated by BECK, Ch. J., as follows: "The intestate, at the time of his death, was the engineer in charge of an engine drawing a freight train between Burlington and Ottumwa. He was instructed to make the trip without stopping at any station unless signaled or specially directed. It appears that it was the duty of the conductor or brakeman of the rear end of the train, when passing stations, to make signals to the engineers. The train having reached Leffler, and the engine and many cars having passed the station house, the intestate, after making inquiry of the firemen in regard to the expected signal, which, it appears, was not given, went to the side of the engine usually occupied by the fireman, and leaned out of the 'gangway,' looking back for the expected signal. He was almost instantly struck upon the head by a 'water-crane' or 'water-column,' causing an injury which soon resulted in death. The water-crane, or the frame supporting it, was about two feet from the floor of the gangway upon which intestate was standing when he received the injury." \* \* \*

**HAAS, ADM'R v. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY.***Supreme Court, Iowa, January Term, 1894.*

(Reported in 90 Iowa, 259.)

**COLLISION BETWEEN CONSTRUCTION AND PASSENGER TRAINS—FIREMAN INJURED—RULES AND REGULATIONS—CONTRIBUTORY NEGLIGENCE.**—A fireman of a construction or work train is not guilty of contributory negligence because of his failure to object to the conductor's orders to take his train on the main track, where it collides with a passenger train which he knew was due, and also probably knew had not passed, notwithstanding the rules of the defendant company prohibited work trains leaving without orders, and required such orders to be shown to the fireman. The fact that the fireman ought to have known that the passenger train had not passed would not be knowledge that his train ought not to start, if he was without knowledge as to what information the conductor had received in relation thereto (1).

**IMMINENT PERIL—EMERGENCY.**—It is not necessarily negligent for a person suddenly exposed to imminent peril and danger to act in a manner which he thinks best for his own safety, although what he does may not be the right thing, or what he would not have done at a time free from excitement.

**VERDICT—DAMAGES NOT EXCESSIVE.**—A verdict for \$8,000 damages for the death of a fireman, a man of good habits, health and intelligence, earning two dollars and twenty cents per day, and with a life expectancy of forty years, was not excessive.

**I. Injuries to locomotive firemen.**—  
In *COOPER v. CENTRAL RAILROAD OF IOWA*, 44 Iowa, 134 (December Term, 1876), fireman fatally injured by train being thrown from track in collision with cow on track, judgment for plaintiff in the Marshall District Court was *affirmed*.

*KUHNS, ADM'R v. WISCONSIN, IOWA & NEBRASKA R'Y CO.*, 70 Iowa, 561 (March Term, 1887); fireman killed in derailment of tender and engine, defective wheel on tender breaking, causing tender and engine to fall down embankment; judgment for plaintiff in Black Hawk Circuit Court *reversed*; errors in rulings as to evidence and requests to charge, etc.

In *KNOTT v. DUBUQUE & SIOUX CITY R'Y CO.*, 84 Iowa, 462 (January, 1892), fireman, jointly employed by two companies on locomotive engine, injured by being thrown violently backwards, caused by a sudden and violent movement of the engine, the engine being defective, judgment for plaintiff in the Lyon District Court for \$9,000 was *affirmed*. Where another company assumed the liabilities of the company causing injury to an employee, and was made a co-defendant, the court had jurisdiction of both defendants. The question fully discussed in the opinion by *GIVEN, J.*

APPEAL from Scott District Court. The case is stated in the opinion. *Judgment affirmed.*

JOHN T. FISH, WHITE & MURPHY and MILLS & KEELER, for appellant.

BILLS & HASS, for appellee.

**Robinson, J.** — The plaintiff is the administrator of the estate of P. W. Davies, who was killed on the 21st day of May, 1890, while in the employment of defendant as fireman of the locomotive engine of one of its construction or work trains. His train left Coon Rapids in the morning of that day, in charge of conductor Lyman, under orders to work between the place named and Dedham. An hour or more before noon the train was run into Dedham, to clear the track for a freight train known as "No. 11;" and the conductor there received an order that the west-bound passenger train designated as "No. 3" would be fifty-five minutes late. The work train was run out a few miles, and was again taken back to Dedham. The conductor and others of the trainmen, including Davies, then took dinner in Dedham, at a place which was located about two blocks from the main railway track. The men sat at the same table while the meal was being eaten, and, it is claimed, the fact that No. 3 was late was mentioned by some of them. After they had finished eating, the men returned to the railway; the engineer and fireman going to the engine, and the conductor and rear brakeman to the depot, to inquire about train No. 2. On being informed that it was late, the conductor ordered the brakeman who was with him to throw the switch for the main line, and gave the engineer the signal to go ahead. Before that time, No. 3, if only fifty-five minutes late, should have passed the station going westward, but it was then an hour and twenty minutes late, and had not reached it. The conductor had forgotten the train, and did not inquire for it of the operator, and it had also been forgotten by the rear brakeman. In obedience to the signal, the engineer moved the train onto the main line, and thence eastward. When about a quarter of a mile east of Dedham, the engineer discovered No. 3, within a short distance, approaching at the rate of about forty-five miles an hour. He set the air-brakes, called to Davies to jump, struck him on the shoulder in passing, and jumped from the engine. Davies did not jump. There was a collision, and he was crushed between the tank and boiler-head of his engine, dying within half an hour.

1. It is not disputed that the conductor was negligent in not protecting his train against No. 3, but it is claimed that Davies should also have known that it had not passed the station, and that he was negligent in not calling the attention of his co-employees to the fact, and in going out on his engine, thereby contributing to the cause of his death. The rules of defendant in force at the time of the accident contained the following: "The safety of passengers and trains is of the first importance, and all operations of working and repairing the road must be subservient thereto." "[98.] All special orders for the movement of trains must be addressed to the conductor and engineer, of which three copies shall be made. \* \* \*" "[100.] A train must not leave a station, when directed to run by special order, unless the conductor and engineer have a copy of the same in their possession. [101.] Conductor must in all cases show telegraphic orders pertaining to movements of trains to the rear brakeman, and, when practicable, to the forward brakeman. Engineers must in all cases show the same to the fireman, and, when practicable, to the forward brakeman. Brakemen and firemen must report every instance when conductors and engineers fail to comply with this rule." The order in regard to train No. 3 was dated at Perry, was addressed to the conductor and engineer, and read as follows: "Number three [3] will run fifty-five [55] minutes late from Perry to Co. Bluff's." It was received by the conductor and engineer at 10:53 o'clock in the forenoon. The conductor read his copy of the order to the rear brakeman, the forward brakeman being absent, and Davies knew of it.

The effect of the order was to permit the work train to use the track for fifty-five minutes immediately following the schedule time of No. 3, or, as stated by appellant, it gave the right to the work train to use fifty-five minutes on the schedule time of the passenger train, and no more. It is said that the work train moved only by special orders, and as an irregular train of an inferior class. It was required to keep out of the way of all regular passenger and other trains. The superintendent of the division of that part of the railway on which the accident occurred states that work trains are run wholly by special orders, and have no existence except as given by telegraphic order; but that was not true to the extent claimed. The general movements of work trains depended upon telegraphic orders, which directed the conductor and engineer where the train should be worked,

and informed them in regard to other trains; but the manner in which the orders should be observed was necessarily left largely to the discretion of the conductor, and it was ordinarily the duty of the other trainmen to obey his orders. If the claims now made by appellant are well founded, then it was the duty of the trainmen to refuse to obey the directions of the conductor until they had first satisfied themselves that the directions were authorized by the telegraphic orders, and when a discretion was lodged in the conductor it would have been their duty to refuse obedience unless they should approve his orders as within that discretion. It is scarcely necessary to say that such a rule would destroy the discipline essential to the proper management of trains, and we find nothing in the record which requires that it be enforced in this case. Whether Davies knew that No. 3 had not passed when the conductor ordered his train out onto the main line is not shown. It is probable, but not certain, that he would have heard the train had it gone through the station while he was at dinner. But, conceding that he should have known that it had not yet arrived, it does not follow that he knew his train should not have been ordered out. He knew he had not seen a telegraphic order which announced any further change in the time of No. 3, it is true, but he did not know what information the conductor had received. It may be said that it was his right to see the order if one had been received, and that until he saw it he should have acted on the presumption that none had been sent, but such a course on his part was not required by the rules. They provided that train and enginemen should be held equally responsible for the violation of any of the rules governing the safety of the trains, and that they should take every precaution for the protection of trains, even if not provided for by the rules; but they also provided that the conductor should have charge and control of the train and of all persons employed on it, and made him responsible for its movements while on the road, "except when his directions conflict with the rules or involve risk or hazard," in either of which cases the engineer was to be held alike accountable. Brakemen and firemen were required to report every instance when the conductors and engineers should fail to show their telegraphic orders as provided by rule 101, but we find nothing in the rules which required them to disobey the orders given. The provision holding them equally responsible for the violation of the rules governing the safety of

the train must be given a reasonable construction. It applied to each one within the range of his own duties, and did not make him responsible for the wrongful actions or omissions of others. It is said that Davies and all the other trainmen forgot all about No. 3. That is not shown by the evidence, although the rear brakeman testified to that effect; but it is evident that he had no means of knowing the fact in regard to the engineer and fire man. The conductor and rear brakeman forgot it. The engineer remembered it, but, as the conductor had just come from the telegraph station when the signal to move was given, he concluded that the train had passed. It is not shown that Davies had forgotten, nor is it shown that he knowingly went into a place of danger, and the jury may well have found that he was not negligent in remaining at his post.

2. The appellant complains of the fifth paragraph of the charge to the jury, which is as follows: "[5.] You are, however, in this connection, to remember that when a person suddenly finds himself exposed to great peril and danger, and is obliged to act upon the spur of the moment, it is not necessarily negligence if, under such circumstances, he did what he thought was for the best for his own safety, although what he then did may not be the right thing, or what he would have done in cooler moments, and when he was free from excitement." The ground of the complaint is that there is no evidence to justify it. It is said that the responsibility of Davies must be judged from what he did or failed to do when his train was ordered onto the main track, and that the instruction was not applicable to him as he was situated at that time. But it referred to his situation at the time of the collision. The engineer spoke to and struck him to warn him of the danger, and then jumped from the train, thus saving himself. Had Davies also jumped, he might have escaped injury; and the court correctly charged the jury in regard to his duty, and the weight to be given to his conduct under such circumstances.

3. The appellant contends that the amount of the verdict is excessive, and that the jury were not properly charged in regard to the measure of damages. We discover no error in the charge in that respect. The amount allowed was \$8,000, and we cannot say it was excessive. The expectancy of life of the decedent was a little more than forty years, and his earnings were \$2.20 per day. He was of good habits, free from disease and intelligent

The damages in such a case cannot be determined accurately. There was evidence upon which to base the verdict rendered, and we do not think it should be disturbed. See *Locke v. Railway Co.*, 46 Iowa, 115; *Lowe v. Chicago, St. P., M. & O. R'y Co.*, 89 Iowa, 420, 56 N. W. 523 (1).

4. What we have said disposes of the controlling questions in the case. Some objections are urged by appellant which we have not mentioned in detail, but we have examined them all, and conclude that the record does not disclose any error prejudicial to the defendant. The judgment of the district court is affirmed.

FIREMAN INJURED BY ENGINE RUNNING INTO SNOW BANK — RISK OF EMPLOYMENT. — In *BROWN, ADM'X, v. CHICAGO, ROCK ISLAND & PACIFIC R'Y CO.* 64 Iowa, 652 (*October, 1884*), fireman, on one of defendant's engines, killed by being knocked from the engine by a bank of snow near the track and run over by the train, judgment for plaintiff in the Washington Circuit Court was *reversed*, the syllabus to the official report stating the case as follows:

"Following the case of *Dowell v. Burlington, Cedar Rapids & Northern R'y Co.*, 62 Iowa, 629 (2), it was held that the dangers from snow banks are inseparable from the operation of railroads, when snow prevails and is removed from the track; that employees, when they enter the service, assume the risk of such dangers; and that railroad companies are not chargeable with negligence in leaving the accumulations of snow which it removes in proximity thereto, even though some degree of danger to employees engaged in the operation of trains is thereby created.

"In an action based upon personal injury caused by negligence

1. In *Lowe, ADM'X v. CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA R'Y CO.*, 89 Iowa, 420 (*October, 1883*), plaintiff's intestate, a brakeman in defendant's employ, killed while uncoupling freight cars, engineer giving the cars a "kick," throwing plaintiff's intestate under the wheels, judgment for plaintiff in the Osceola District Court for \$5,000 was *affirmed*; damages not excessive where brakeman at time of injury was 25 years of age, in good health, and earning \$55 per month, his fam-
- ily being entirely dependent upon him for support.
2. In *Dowell, ADM'R v. BURLINGTON, CEDAR RAPIDS & NORTHERN R'Y CO.*, 62 Iowa, 629 (*December Term, 1883*), brakeman falling from engine, run over, and killed by train which was passing through a snow bank, judgment for plaintiff in the Linn Circuit Court was *reversed*, the deceased employee having assumed the risks.

resulting in death, in estimating the measure of damages which the estate of the deceased may recover, it is proper to consider his calling at the time of his death, his ability, the amount of his earnings, and like circumstances; but evidence is incompetent in such a case to prove that he was in the line of promotion in his calling, and that, if promoted, his earnings would have been increased."

In **BRYANT, ADM'R. v. BURLINGTON,, CEDAR RAPIDS v. NORTHERN R'Y CO.**, 66 Iowa, 305 (*June Term, 1885*), fireman killed by overturning of the engine while engaged in "bucking snow," judgment on verdict directed for the railway company in the Linn Circuit Court was *affirmed*, it being held that the accident was one of the risks of employment (two justices, however, dissenting). "The petition stated that Albert Bryant, deceased, was an employee of the defendant, and that the engine on which he was fireman was thrown from the track with great violence, without negligence on the part of the deceased, whereby he was instantly killed. It is stated that the accident occurred because the defendant was negligent in failing to keep the track free from snow and ice; that the defendant, knowing its track was so unincumbered, ran its train at a high rate of speed, well knowing that under such circumstances it was liable to leave the track; that the train on which the deceased was performing the duties as fireman was not provided with a snow-plow, and that there were two engines attached thereto; that the train was run into a large bank of compact snow and ice. The defendant denied that the accident was caused by the negligence of the defendant, and it pleaded that the accident occurred when the train and employees were engaged in "bucking snow," which was one of the usual and ordinary hazards the deceased assumed when he undertook the duties of fireman. There was a trial by jury, and at the conclusion of the plaintiff's evidence the court, on motion, directed the jury to find for the defendant, which, being done, judgment was rendered on the verdict, and plaintiff appealed."

In **BROWN v. CHICAGO, ROCK ISLAND & PACIFIC R'Y CO.**, 69 Iowa, 161 (*June Term, 1886*), fireman killed by coming in contact with a snow bank close to the track, judgment for plaintiff in the Washington District Court was *reversed*, on the ground that the accident was one of the risks of employment. Following *Dowell v. Burlington, C. R. & N. R'y Co.*, 62 Iowa, 629, and *Brown v. Chicago, R. I. & P. R'y Co.*, 64 Iowa, 652.

See former appeal in the **BROWN** case, 64 Iowa, 652.

SECTION HAND KILLED BY PASSING FREIGHT TRAIN — PRESUMPTION OF NEGLIGENCE — EVIDENCE — INSTRUCTIONS — DAMAGES. — In *WHEELAN, TRUSTEE, v. CHICAGO, MILWAUKEE & ST. PAUL R'Y CO.*, 85 Iowa, 167 (*May, 1892*), section hand killed by passing freight train, judgment for plaintiff in the Johnson District Court was *reversed*, the facts being stated in the syllabus to the official report (paragraph 1) as follows:

"In an action for damages for the negligent killing of one D., a section hand employed on the defendant's railway, it appeared that the deceased was killed by a passing freight train while standing within a few feet of the track, and leaning upon a crow-bar, the opposite end of which rested upon the ground higher than that where the deceased was standing. The train in question contained several dump cars, the doors of which were from twelve to fifteen feet in length, and about three feet in width, and were hung from the top of the car, and fastened at the bottom. It was the theory of the plaintiff that the fastening to the doors of one of these cars was so defective that the doors became unfastened, and swinging outward toward the deceased as the train passed, struck the bar upon which he was leaning with such force as to drive it against his neck and breast, and instantly killing him. The evidence showed that the door in question was found down at several points below the place where the accident occurred, and was fastened up, but that it was not down at the next station above; that the portion of the door which it is claimed struck the bar in the hands of the deceased was about two inches wide and nearly an inch thick, but that the bar showed no dent nor other indication of having been struck. The court instructed the jury that to justify them in finding that the deceased was killed as alleged, 'it was necessary, not only that the circumstances should all concur to show that he was so killed, but that they were inconsistent with any other rational conclusion;' that the jury could not 'presume that a door was down and swinging, or that it swung outward and caused the accident;' but that the 'evidence must reasonably and fairly show' such facts, and 'must exclude any fair inference or presumption that the accident was caused in any other manner or by any other means.' *Held*, that under the evidence, a verdict for the plaintiff was inconsistent with the instructions given." Other points were decided, among them being as to evidence on life expectancy, it being held that although deceased was a minor at time of accident, evidence of his expectancy of life should have been based upon his age at time of decease, and not at the assumed age of twenty-one years.

## MOORE v. CENTRAL RAILROAD OF IOWA.

*Supreme Court, Iowa, June Term, 1878.*

(Reported in 47 Iowa, 688.)

**EMPLOYEE TRYING TO AVOID DANGER FROM RUNAWAY TEAM STEPPING ON TRACK AND STRUCK BY HAND CAR — LIABILITY OF RAILROAD COMPANY.** — Where an employee, engaged in making repairs to a switch on defendant's road, stepped upon the track to avoid being injured by a runaway team of horses, and was struck by a hand car operated by defendant's employees, and it appeared that one of the men on the hand car saw the plaintiff on the track before the car struck him, and gave an alarm, which was disregarded, and no effort made to check the speed of the car until the foreman of the car saw plaintiff and gave the order for the brakes to be applied, it was held that there was sufficient evidence of negligence on the part of defendant to sustain verdict for plaintiff.

**IMMINENT DANGER — EMERGENCY.** — In such case the plaintiff was not to be charged with negligence in seeking safety from the runaway team by going upon the railroad track without exercising thought and care to avoid danger from cars, as a person acting under such an emergency could not be expected to exercise that cool reflection which men ordinarily possess in the absence of danger.

**NEGLIGENT RUNNING OF HAND CAR.** — It was negligence to run a hand car at a rapid rate of speed at a place where the men on the car knew that employees were working with a team, where it might be reasonably apprehended that running a car at a rapid rate would frighten the team to the danger of persons or property.

**MEASURE OF DAMAGES — EVIDENCE.** — It is competent for an injured party to show the nature of his employment and his dependence thereon for support as well as the value of his services.

**DAMAGES — VERDICT NOT EXCESSIVE.** — Where an employee working on defendant's track was injured in the spine, resulting in great pain and suffering, preventing him for a long time from engaging in any labor, and up to the time of trial could not work without suffering, a verdict for \$2,000 damages was not excessive.

**APPEAL** from Mahaska District Court. The case is stated in the opinion. Judgment for plaintiff for \$2,000 *affirmed*.

SEEVERS & CUTTS, for appellant.

W. S. KENWORTHY and JOHN F. LACEY, for appellee.

**Beck, J.** — The plaintiff was employed in making some repairs or additions to the earth works of a switch on defendant's railroad, near a station and water tank. About the close of a day's work a team of horses which he, with others, was using, took fright and ran toward him. At the time he was near, within a pace or so, of the main track of the railroad, and did not observe

the frightened team until it was within one rod of him. To avoid the horses plaintiff stepped upon the railroad, and a hand car, operated by the defendant's workmen, ran against him, inflicting injuries which are the foundation of the action.

1. It is first insisted, by defendant's counsel, that there was no evidence offered at the trial of negligence on the part of the workmen engaged in running the car, and, therefore, the verdict ought to have been set aside by the district court. We think differently. The car was running at quite a rapid speed, approaching a place where plaintiff and others were engaged at work near the track; no one on the car seems to have been looking ahead to avoid accident, though before plaintiff was struck he was seen by one or more of the men, and one of them gave an alarm for stopping, which was disregarded, and no effect made to check the speed of the car until the foreman saw plaintiff, and gave the order for the brakes to be applied. The evidence of the witnesses does not agree upon the point whether the car could have been stopped before striking plaintiff, had the brakes been used when the first alarm was given. The foreman expresses an opinion as to the distance required to stop the car, which is less than the distance from plaintiff to the car when the alarm was given. Other facts and circumstances of a like character tend to establish negligence of defendant's servants. There was, therefore, evidence of negligence, and, though its preponderance may be regarded for defendant it cannot be held there is such an absence of proof as to warrant the conclusion that the verdict was the result of passion or prejudice.

2. It is argued that the evidence establishes negligence on the part of plaintiff, and the ground of this position is that he did not, when he ran, or rather stepped, upon the railroad track, look for the car. It is claimed that as it was about the time the workmen would be returning plaintiff ought to have exercised thought and care to discover danger from their approach. The plaintiff fled upon the railroad for safety from the frightened team; it cannot be expected that one under such circumstances will exercise the cool reflection which men ordinarily possess in the absence of danger. See *Frandsen v. Chicago, R. I. & P. R. Co.*, 36 Iowa, 372 (14 Am. Neg. Cas. 639, *ante*). It may be that he could have fled in another direction. But he is not to be held negligent if in obedience to the instincts of nature he sought safety by the nearest way of escape rather than by

another, which reflection would have pointed out. Besides, as he was fleeing from animals that are not governed by intelligence and prudence, he could well take refuge where the law required these qualities to be exercised by men for his protection. We do not think, under the circumstances, the mere fact that he did not see or look for the car was negligence. This view also disposes of an objection founded upon the refusal to give an instruction to the effect that plaintiff was, in the exercise of ordinary care, required to look for the approaching car, and another denying excuse for want of forethought on the part of plaintiff on account of fright caused by his danger from the approaching team.

3. The court directed the jury that if the workmen on the hand car knew plaintiff and others were working with a team at the place, and reasonably might have apprehended that if they ran up at a rapid rate the team would become frightened and endanger persons or property, then the running in that manner would be negligence. The rule of the instruction is not claimed to be incorrect, and we do not, therefore, discuss it, but counsel insist that there was no evidence to which it was applicable. We think the objection is not well taken. The workmen were section hands employed in keeping the road in repair and passed the place when they went to their work, and the jury may well have found from these facts that they knew plaintiff and others were engaged in constructing an embankment and that a team was used upon the work.

4. The defendant asked an instruction to the effect that "if when the section hands on the car saw the plaintiff he was not on the track, then they were not bound to stop the car or slacken the speed." This was refused and the ruling is assigned for error. It is clearly incorrect. If the plaintiff was not, when first seen by the workmen, upon the track but approaching it with the apparent intention of going upon it, without discovering the car, ordinary care required its speed to be checked. The duty of those on the car required them to stop it, if danger was threatened to plaintiff, whether he was on the track, near it or approaching it.

5. Another instruction asked by defendant announces a rule to the effect that the men upon the car had a right to suppose, if they saw plaintiff on the track, that he would step off, and were not required to check the speed of the car, unless they knew or had reason to suppose he did not see the car. It was refused,

and of this defendant complains. The principle of the instruction really is that plaintiff was required to exercise care and prudence for his own safety, and defendant's servants exercised ordinary prudence in acting under a reasonable supposition that he would remove himself from danger; that is, if plaintiff was negligent defendant is not liable even if its servants were careless, and if plaintiff was not negligent and defendant's servants were, he can recover. Other instructions given by the court announced this rule, and the jury could not have failed to understand their applicability to the supposed facts, did the evidence establish them. The refusal of the instruction, inasmuch as the same rule had been given, was not error.

6. The plaintiff, in response to certain questions as to his condition and means of support, was permitted to testify as follows: "When I try to labor I suffer; I am a poor man and was poor when the accident happened; have frequently excruciating pain along the spine; my chance for support of myself and family is my daily labor." The admission of this evidence is made the ground of objection to the judgment. It was proper for the court to admit evidence showing the nature of plaintiff's employment, and his dependence thereon for support as well as the value of his services. In estimating the damages to which he was entitled these facts are lawfully considered. But the ground of objection is, he was permitted to show that he was poor. The mere fact of his poverty did not give him a right to recover increased or diminished damages, and to establish any such right the evidence was inadmissible. But the fact that he depended upon his daily labor for support was a fact proper for the consideration of the jury, and that he was poor tended to establish such dependence. The evidence was not incompetent.

7. It is lastly urged that the verdict is excessive. There is not an agreement in the evidence as to the permanency of plaintiff's injuries. They were certainly severe, and resulted in great pain and suffering, and for a long time prevented him from engaging in any employment, and up to the time of the trial he could not labor without suffering. We do not think that under the evidence the verdict is for a sum beyond a reasonable compensation for the actual damages he sustained.

Judgment affirmed.

## NOTES OF IOWA CASES RELATING TO INJURIES TO RAIL-ROAD EMPLOYEES.

**1. Brakemen injured.**

1. COUPLING AND UNCOUPLING CARS.
2. COUPLING CAR TO ENGINE.
3. DEFECTIVE APPLIANCES AND CARS.
4. DEFECTIVE TRACK, YARDS, ETC.
5. DERAILMENT.
6. FALLING FROM CARS.
7. FLYING OBJECT.
8. LADDER ON CAR.
9. OBJECT NEAR TRACK.
10. MINOR EMPLOYEES.
11. MISCELLANEOUS.

**2. Coupling and uncoupling cars.**

- a. Employees coupling cars.
- b. Switchmen injured.
- c. Miscellaneous.

**3. Conductors injured.****4. Laborers injured.**

- a. Loading and unloading.
- b. Struck by cars.
- c. Walking on track.
- d. Miscellaneous.

**5. Machinists injured.****6. Miscellaneous.****7. Object near track.****8. Section hands, etc., injured.**

- a. Construction trains, flat cars, etc.
- b. Hand cars.
- c. Track.
- d. Miscellaneous.

**1. Brakemen injured.****i. COUPLING AND UNCOUPLING CARS.**

In *BELAIR v. CHICAGO & NORTHWESTERN R'Y Co.*, 43 Iowa, 662 (June Term, 1876), brakeman injured while coupling cars, the appliances being defective, he being thereby crushed between cars, the injuries being severe and permanently disabling him, judgment for plaintiff in the Boone Circuit Court for \$11,000 was *affirmed*. Plaintiff was 30 years of age and earning \$540 a year at time of accident. Damages not excessive.

In *HAMMER, ADM'R v. CHICAGO, ROCK ISLAND & PACIFIC R'Y Co.*, 61 Iowa, 56 (April Term, 1883), plaintiff's intestate, an "assistant brakeman," while attempting to uncouple freight cars while in motion, run over and killed by train, judgment for plaintiff in the Polk Circuit Court was *affirmed*.

In *ROMICK, ADM'R v. CHICAGO, ROCK ISLAND & PACIFIC R'Y Co.*, 62 Iowa, 167 (December Term, 1883), brakeman killed while making a coupling, the train being backed without signal, judgment on verdict directed for

defendant in the Madison Circuit Court was *reversed*, the court erring in withdrawing the case from the jury.

In *BUCKLEW v. CENTRAL IOWA R'Y CO.*, 64 Iowa, 603 (October, 1884), brakeman on freight train injured while on track to make a coupling, judgment for plaintiff in the Jasper District Court was *reversed* for erroneous admission of evidence of custom of employees in incurring danger. Plaintiff was a brakeman on a freight train, and claimed to have been injured by reason of the negligence of the engineer and fireman in failing to obey a signal given by him to stop the train so that he could with safety make a coupling it was his duty to make. Plaintiff stepped on the track for the purpose of procuring a link with which to make the coupling, and while there the train struck the car, causing it to run over plaintiff. Plaintiff was asked by his counsel: "What was the usual custom about going in to make couplings, or going in to get links or pins, after giving the signal, as to waiting or delaying till trains stop or not?" Objection to question overruled, and witness answered: "They don't wait." The court said: "The custom proved, no doubt, applies to ordinary couplings, which must of necessity be made by the employees going between the cars when they are in motion. But it was not necessary that the plaintiff should step on the track to get the link while the train was in motion." Admission of such evidence held erroneous.

In *NICHOLS v. CHICAGO, ROCK ISLAND & PACIFIC R'Y CO.*, 69 Iowa, 154 (June Term, 1886), brakeman injured while coupling cars, his hand being crushed between the deadwoods, judgment for plaintiff in the Washington District Court was *reversed*, the verdict being contrary to the evidence and the instructions.

In *DEEDS v. CHICAGO, ROCK ISLAND & PACIFIC R'Y CO.*, 69 Iowa, 164 (June Term, 1886), brakeman's hands and fingers injured while coupling cars, judgment for plaintiff in the Washington District Court was *reversed* for erroneous instruction as to negligence of employee, the word *solely* being likely to mislead the jury in finding in his favor if his negligence only contributed to the injury.

A subsequent trial in the *DEEDS* case resulted in verdict and judgment for plaintiff, but was *reversed* in Supreme Court for erroneous instructions based on assumed facts of which there was no evidence, and as to violation of rules. See 74 Iowa, 154 (December Term, 1887).

*REED v. BURLINGTON, CEDAR RAPIDS & NORTHERN R'Y CO.*, 72 Iowa, 166 (June Term, 1887); brakeman injured coupling cars; defective cars; judgment for plaintiff in the Tama Circuit Court *affirmed*.

In *NICHOLAUS v. CHICAGO, ROCK ISLAND & PACIFIC R'Y CO.*, 90 Iowa, 85 (January, 1894), brakeman injured while making a coupling, his hand being caught between the bumpers, judgment for plaintiff in the Muscatine District Court was *affirmed*. It appeared that plaintiff had signaled the acting engineer to stop, and the train had nearly stopped, when the train suddenly backed without notice, thus causing the injury to plaintiff's hand.

*STRONG v. IOWA CENTRAL R'Y CO.*, 94 Iowa, 380 (April, 1895); head brakeman on freight train injured while coupling cars; negligent act of engineer in increasing speed of train without warning; defective coupling appliance; judgment for plaintiff in the Marshall District Court for \$1,500

*affirmed*; verdict not excessive for loss of finger, injured hand and impaired earning capacity of plaintiff by fifteen dollars a month.

2. COUPLING CAR TO ENGINE.

In *PHILO v. ILLINOIS CENTRAL R. R. Co.*, 33 Iowa, 47 (December, 1871), brakeman on freight train fatally injured in an attempt to uncouple the tender of the locomotive to another car, judgment for plaintiff for \$7,500 in the Dubuque Circuit Court was *affirmed*. The points decided are stated in the syllabus to the official report as follows: "Where an employee of a railroad company is injured in consequence of the negligence of a co-employee the company will be regarded as 'the perpetrator' of the act within the meaning of section 4111 of the Revision;" and: "Where an employee of a railroad company is killed through the negligence of a co-employee, a right of action, as provided by section 7, ch. 169, Acts of General Assembly, accrues to the representatives of the deceased." The action was brought by the executrix of decedent's estate, and on the trial a verdict was rendered for plaintiff in the sum of \$16,000. On motion for new trial the trial court held the verdict excessive, and ordered it set aside unless plaintiff should remit \$8,500. The remittitur for that sum was entered, and thereupon there was judgment against defendant for \$7,500.

In *HAMILTON v. DES MOINES VALLEY R. R. Co.*, 36 Iowa, 31 (December Term, 1872), brakeman attempting to couple engine to car loaded with timber injured by being caught between the projecting timbers and the tender, judgment for plaintiff in the Lee District Court was *affirmed*. In the Hamilton case the following instruction was given: "It is the law of Iowa that every railroad company is liable for all damages sustained by any person, including employees, in consequence of any neglect of the agents or by any mismanagement of the engineers or other employees of the corporation, provided the plaintiff did not contribute to the injury by his own want of proper care or negligence." It was urged by defendant that the use of the terms "*any neglect*" and "*any mismanagement*" implied that defendant was liable for want of extraordinary care; but the court held otherwise, and that the instruction was not erroneous. [See paragraph 8 of the syllabus to the official report.]

In *REED v. CHICAGO, ROCK ISLAND & PACIFIC R'y Co.*, 57 Iowa, 23 (December Term, 1881), brakeman, while attempting to couple engine to part of train, injured by negligence of fireman in charge of engine moving it without signal, one of plaintiff's fingers being injured, judgment for plaintiff in the Mahaska Circuit Court was *reversed* for erroneous instruction, which included reasonable compensation for medical attendance, etc., as the value of such services must be proved.

In *FERGUSON v. CENTRAL IOWA R'y Co.*, 58 Iowa, 293 (June Term, 1882), brakeman on freight train on side track, at instance of yardmaster, going between engine and car to uncouple the car from engine, injured by his foot being caught by wheel of the tender and crushed, the train being backed at the time, judgment for plaintiff in the Marshall Circuit Court was *reversed* for erroneous submission of a certain interrogatory as to manner of coupling and uncoupling cars.

In *BEEMS, ADM'R v. CHICAGO, ROCK ISLAND & PACIFIC R'y Co.*, 67 Iowa,

435 (December Term, 1885), brakeman killed while attempting to uncouple car from the tank or tender of the engine, judgment for plaintiff in the Cass Circuit Court for \$2,500 was *affirmed*.

See also BEEMS, ADM'R v. CHICAGO, ROCK ISLAND & PACIFIC R'Y Co., 58 Iowa, 150 (June Term, 1882), brakeman fatally injured by foot catching between rails while he was between cars uncoupling them, the train going at unusual rate of speed, whereby he was run over, judgment for plaintiff in the Cass Circuit Court was *reversed* for erroneous admission of evidence as to number of deceased's family, on the question of damages.

In BROWN v. BURLINGTON, CEDAR RAPIDS & NORTHERN R'Y Co., 92 Iowa, 408 (October, 1894), brakeman's right foot crushed by being thrown under wheels of tender of engine, he standing on the brake beam on the tender while uncoupling cars which were being pushed by engine, and the engineer negligently setting the air brakes without warning from plaintiff, whereby the brakebeam was jerked, causing the accident to plaintiff, judgment for plaintiff in the Linn District Court was *affirmed*.

VAN WINKLE, ADM'R v. CHICAGO, MILWAUKEE & ST. PAUL R'Y Co., 93 Iowa, 509 (January, 1895); brakeman coupling an engine and "foreign" freight car injured by being squeezed or compressed "between them;" judgment for plaintiff in the Wapello District Court *reversed*; erroneous admission of opinion evidence, etc.

### 3. DEFECTIVE APPLIANCES AND CARS.

CONWAY v. ILLINOIS CENTRAL R. R. Co., 50 Iowa, 465 (June Term, 1879); brakeman and baggage master on defendant's road injured while attempting to couple freight car to a baggage car; cars of different heights; failure to furnish proper appliances; judgment in Black Hawk District Court *reversed*; railroad company required to use only reasonable degree of care in providing safe cars, machinery, etc.

REBELSKY v. CHICAGO & NORTHWESTERN R'Y Co., 79 Iowa, 55 (January Term, 1890); brakeman caught between a car in bad order which had become detached from car and the car to which plaintiff was assisting in attaching it; absence of drawbar on bad-order car; knowledge by brakeman; judgment for defendant in the Clinton District Court *affirmed*; contributory negligence.

VAN GENT v. CHICAGO, MILWAUKEE & ST. PAUL R'Y Co., 80 Iowa, 526 (May Term, 1890); brakeman on construction train attempting to couple flat car to a caboose fatally injured by being crushed by the bumper of a car; defective cars and track; cars of different heights; judgment for plaintiff in the Wapello District Court *affirmed*.

In COFFMAN, ADM'R v. CHICAGO, ROCK ISLAND & PACIFIC R'Y Co., 90 Iowa, 462 (January, 1894), brakeman fatally injured while coupling cars to freight train, judgment for plaintiff for \$2,500 in the Shelby District Court was *reversed*. The syllabus to the official report states the case as follows: "Plaintiff's theory being that the brakeman was injured because two couplings were misfits and thus permitted the cars, unsupplied with bumpers, to come together, and that he stood between them when they met, there should be judgment *non obstante* where special findings show that decedent's signals for backing were obeyed, that he knew the kind of cars he was to couple,

had coupled such before, and had been told how to couple them and not to stand between the cars, but at their side, when they came together."

#### 4. DEFECTIVE TRACK, YARDS, ETC.

In *WILLIAMS v. CENTRAL RAILROAD OF IOWA*, 43 Iowa, 396 (June Term, 1876), brakeman injured by his foot being caught in a frog while coupling cars, the cars being shifted along a foot or two, judgment for plaintiff in the Marshall Circuit Court was *reversed* for erroneous instruction. The court said: "No negligence is attributed to the company on account of the frog. Whatever danger of plaintiff stepping into it there might have been by reason of his moving along with the train was an open and well-known danger, and not to be obviated by any greater care or skill of the company, so far as the frog was concerned. The defendant's liability arises, if at all, by reason of having caused the plaintiff to be thrown off his guard. It did not arise from his being forced an unnecessary distance over necessarily dangerous ground. He admits he could have stepped out. Instead of so doing, he stepped forward a little, or remained subject to the movement of the train, to accomplish the coupling. At most, then, he was induced by his failure to couple readily to move, or allow himself to be moved, over dangerous ground." The accident was not the proximate result of the negligence complained of, namely, failure to furnish cars that can be coupled readily.

In *BAIRD v. CHICAGO, ROCK ISLAND & PACIFIC R'Y CO.*, 55 Iowa, 121 (December Term, 1880), brakeman coupling freight cars trying to escape from danger of moving cars, stumbling into ditch on track, caught upon drawbar of car, and his fingers crushed by the coming together of the cars, judgment for plaintiff in the Madison Circuit Court was *reversed*, the general verdict being inconsistent with the special findings.

A subsequent trial in the BAIRD case resulted in general verdict for plaintiff, but judgment was rendered on special findings for defendant from which plaintiff appealed. On appeal judgment was *reversed* and new trial granted; questions of practice discussed. *BAIRD v. CHICAGO, R. I. & P. R'Y CO.*, 61 Iowa, 359 (June Term, 1883).

In *COATES, ADM'X v. BURLINGTON, CEDAR RAPIDS & NORTHERN R'Y CO.*, 62 Iowa, 486 (December Term, 1883), brakeman caught in a frog and run over by train while engaged in coupling cars, judgment for plaintiff for \$5,000 in the Linn Circuit Court was *reversed* for erroneous instructions on assumption of risk, employee's knowledge of danger, measure of damages, etc.

In *MAYES, ADM'R v. CHICAGO, ROCK ISLAND & PACIFIC R'Y CO.*, 63 Iowa, 562 (June Term, 1884), brakeman killed by being run over by cars, his foot catching between guard rail and rail of track while attending to his duties, judgment on verdict directed for defendant in the Pottawattamie District Court was *reversed*, the questions whether the defects were open and obvious and the inexperience of the employee were matters for the jury to determine, and it was error to take the case from the jury. But on rehearing this point in the opinion was modified, the court holding that the evidence was such as to charge the employee with knowledge of the defects as matter of law. The burden of proof to establish the fact that the employee waived the company's negligence is upon defendant.

FORD, ADM'X v. CENTRAL IOWA R'Y CO., 69 Iowa, 627 (October Term, 1886); brakeman coupling cars run over and killed, his foot catching between the main rail and guard rail; judgment for plaintiff in the Wright Circuit Court *reversed*; evidence not sufficient to show negligence on part of defendant's employees.

ROBISON v. CHICAGO, ROCK ISLAND & PACIFIC R'Y CO., 71 Iowa, 102 (March Term, 1887); brakeman uncoupling cars stepping into cattle guard and injured, the switch yard being alleged to be dangerous on account of the switch being built too near to the cattle guard; judgment for plaintiff *reversed* for erroneous instruction. See also former appeal in 67 Iowa, 292.

SEDGWICK v. ILLINOIS CENTRAL R'Y CO., 73 Iowa, 158 (October Term, 1887); brakeman injured while coupling cars; falling into cattle guard while between car and engine and run over by tender; judgment for plaintiff in the Black Hawk Circuit Court *reversed*; erroneous exclusion of certain evidence.

A subsequent trial of the SEDGWICK case resulted in verdict and judgment for defendant, which, on appeal to the Supreme Court, was *affirmed*. See 76 Iowa, 340 (October Term, 1888).

BROOKE, ADM'X v. CHICAGO, ROCK ISLAND & PACIFIC R'Y CO., 81 Iowa, 504 (October, 1890); brakeman fatally injured by foot being caught between rails of a "split switch" while he was coupling cars, being thrown down and run over; judgment for plaintiff in the Jasper District Court *affirmed*.

In FISH, ADM'X v. ILLINOIS CENTRAL R'Y CO., 96 Iowa, 702 (January, 1896), brakeman engaged in uncoupling cars at night stepping on stones in railroad yard, falling and run over, and sustaining fatal injuries, judgment for plaintiff for \$5,000 in the Cherokee District Court was *affirmed*. Among the points decided (as per syllabus to the official report) were the following:

"Assuming risk does not preclude recovery for the death of a brakeman caused by stumbling on a loose stone in the yards, though he knew that gravel trains from which stones fell were in the yards where he went to work at midnight and also knew that the company was accustomed to clear such stones from time to time."

"Statements as to the cause of an accident made within two minutes after it happens are admissible as *res gestae*.

"A rule may be waived because of the fact that officers know it is being disregarded by employees, though the latter have knowledge of the rule and of the dangers the rule is intended to avert."

In McFALL v. IOWA CENTRAL R'Y CO., 96 Iowa, 723 (December, 1895), brakeman injured while coupling cars in defendant's yard, caused by slipping on ice formed in the yard by reason of a leak in the water tank, which leak was alleged to be due to defendant's negligence, judgment on verdict directed for defendant in the Mahaska District Court was *reversed*, it being held that the question of contributory negligence was for the jury, and that direction of verdict for defendant was erroneous.

SPALDING, ADM'R v. CHICAGO, ST. PAUL & KANSAS CITY R'Y CO., 98 Iowa, 205 (May, 1896); brakeman fatally injured while attempting to uncouple moving cars in defendant's yard; foot caught in unblocked frog; run over by car; right foot cut off and left foot badly injured; judgment for plaintiff in the Howard District Court for \$5,000 *affirmed*.

**5. DERAILMENT.**

In *O'NEILL v. KEOKUK & DES MOINES R. R. CO.*, 45 Iowa, 546 (June Term, 1877), brakeman fatally injured by train running off the track through an open switch, the deceased being on the locomotive instead of attending to brakes on train at the time of the accident, judgment for plaintiff in the Lee District Court was *reversed* on the ground of contributory negligence.

*CONNERS, ADM'R v. PURLINGTON, CEDAR RAPIDS & NORTHERN R'Y CO.*, 71 Iowa, 490 (March Term, 1887); brakeman killed in derailment of train; judgment for defendant in the Cedar Rapids Superior Court, notwithstanding general verdict for plaintiff, *reversed*; when judgment on special verdict allowable; question of contributory negligence.

In the *CONNERS* case, subsequently, plaintiff moved in the Superior Court for judgment on the general verdict, which motion was sustained, but the Supreme Court *reversed* the judgment for erroneous instructions. See 74 Iowa, 383 (May Term, 1888).

A subsequent trial in the *CONNERS* case resulted in verdict and judgment for plaintiff, which, on appeal, was *affirmed* by the Supreme Court. See 87 Iowa, 147 (January, 1893).

**6. FALLING FROM CARS.**

In *PERIGO v. CHICAGO, ROCK ISLAND & PACIFIC R'Y CO.*, 55 Iowa, 326 (December Term, 1880), plaintiff's intestate, a brakeman, injured by falling from cars while in motion, judgment for plaintiff in the Polk Circuit Court was *reversed* for erroneous instruction to the effect that a reasonable inference that an employee was exercising due care at time of accident may be gathered from facts which are simply not inconsistent with such rule, as such an inference may only be drawn from the facts proven.

See also former decision in the *PERIGO* case, where judgment for plaintiff for \$5,000 was *reversed*, on the ground that continuance in service without objection, after knowledge of defect, waives right of recovery for injuries sustained by reason of such defect. 52 Iowa, 276 (December Term, 1879).

In *WHITSETT v. CHICAGO, ROCK ISLAND & PACIFIC R'Y CO.*, 67 Iowa, 150 (October Term, 1885), brakeman injured by falling to ground while attempting to pass from car to tender in performance of his duties, negligence charged being that of the engineer of the train, judgment for plaintiff in the Mahaska District Court was *reversed* for errors in admission of certain evidence; improper cross-examination; instructions, etc.

*DUNLAVY v. CHICAGO, ROCK ISLAND & PACIFIC R'Y CO.*, 66 Iowa, 435 (June Term, 1885); plaintiff, a brakeman, engaged in cutting a train while running slack, thrown from train and injured by sudden checking of train, caused by act of conductor in applying the brakes; judgment for plaintiff in the Keokuk District Court *reversed*; question of conductor's negligence was one of fact, not of law; mistake of judgment not necessarily negligence.

In *BURNS v. CHICAGO, MILWAUKEE & ST. PAUL R'Y CO.*, 69 Iowa, 450 (October Term, 1886), brakeman on top of freight cars killed by falling from car on account of a separation of the train on a "sag" on the track, judgment for plaintiff in the Clayton District Court was *reversed*; assumption of risk, etc.

*HOSIC v. CHICAGO, ROCK ISLAND & PACIFIC R'Y CO.*, 75 Iowa, 683 (May,

1888); brakeman attempting to pass over flat car loaded with machinery, in performance of duties, falling to ground and his right arm run over; judgment for plaintiff in the Mahaska District Court was *affirmed*.

**MAGER v. CHICAGO & NORTHWESTERN R'Y CO.**, 82 Iowa, 249 (January, 1891); brakeman attempting to step from caboose onto station platform as the engine and caboose were moving, stepping toward the east under impression that car was moving that way, thrown to ground and his right hand crushed by the wheels of the car; judgment for plaintiff in the Mahaska District Court *reversed*; contributory negligence.

**McDERMOTT, ADM'R v. IOWA FALLS & SIOUX CITY R'Y CO.**, 85 Iowa, 180 (May, 1892); brakeman killed by falling between cars; several coal cars on train which had end boards on hinges so that same could be used in several ways; in attempting to pass over one of the end boards, which was laying at an angle of thirty degrees with the floor, the brakeman slipped because of accumulation of coal, snow and ice in the car, and fell between the cars and was killed; judgment for plaintiff in the Hardin District Court *reversed*; erroneous instruction. [See also report of the McDermott case in 47 N. W. Rep. 1037.]

#### 7. FLYING OBJECT.

In **THOMAN v. CHICAGO & NORTHWESTERN R'Y CO.**, 92 Iowa, 196 (October, 1894), judgment for the railway company in the Tama District Court was *reversed*. The syllabus to the official report (paragraph 1) states the case as follows: "A brakeman was ordered to go to the head of his train to flag. He knew that ties were being thrown out of a car in that train by men who were not warned of his passing, and who could not see him until he came opposite the door of that car, or nearly so. While passing the opening he was injured by a tie thrown out of it. *Held*, he was guilty of negligence, and would have been so if he had been directed to go by the particular route which he took, and directed to hurry."

#### 8. LADDER ON CAR.

In **BRANN v. CHICAGO, ROCK ISLAND & PACIFIC R'Y CO.**, 53 Iowa, 595 (June Term, 1880), brakeman on freight train, while attempting to descend from car by means of a ladder, the "hand hold" being alleged to be out of repair, judgment for defendant in the Van Buren District Court was *reversed*, it being held that a car inspector and a brakeman using such cars were not fellow-servants in the sense that the latter could not recover from the railroad company for injury caused by the negligence of the car inspector in failing to perform his duties. The question of negligence in failing to inspect a "foreign car" was held to be for the jury to determine.

**NEWMAN v. CHICAGO, MILWAUKEE & ST. PAUL R'Y CO.**, 80 Iowa, 672 (June, 1890); brakeman killed by being crushed between two box freight cars on defendant's track; climbing ladder on side of moving car which passed so close to another car that he was caught between them; judgment for plaintiff in the Linn District Court *reversed*; contributory negligence.

**MCKEE, ADM'R v. CHICAGO, ROCK ISLAND & PACIFIC R'Y CO.**, 83 Iowa, 616 (October, 1891); brakeman on freight train hanging low on ladder of caboose to look under car, with back towards locomotive, killed by his head coming in contact with a wing fence at end of a cattle guard; judgment for

plaintiff in the Wayne District Court *reversed*; knowledge of defect; dangerous position; contributory negligence.

9. OBJECT NEAR TRACK.

In *ALLEN v. BURLINGTON, CEDAR RAPIDS & NORTHERN R'Y Co.*, 57 Iowa, 623 (June Term, 1882), brakeman coupling cars attempting to get off coal car while in motion struck by cattle chute near track, thrown to ground and his foot run over, judgment for plaintiff in the Des Moines District Court was *reversed* for erroneous admission and exclusion of certain evidence.

In *ALLEN v. BURLINGTON, CEDAR RAPIDS & NORTHERN R'Y Co.*, 64 Iowa, 94 (June, 1884), brakeman injured, judgment for plaintiff in the Des Moines District Court was *reversed*, on the ground that the evidence did not establish negligence of the railway company. "The plaintiff sustained the injury which is the foundation of the action while engaged, with other train men, in taking cars from a side track upon which a cattle chute was situated. It became necessary for him to pass the chute while upon a coal car, that he might be ready to go from the car at a proper place in order to turn a switch. He stood upon the oil box of the journal of a wheel, and supported himself with one hand, in the other holding his lantern. While in this position the car passed the cattle chute, which struck him and knocked him to the ground, when the wheels of the car passed over his leg. The petition charged that defendant was negligent in constructing the chute too near the track; and the jury in a special verdict so found." The Supreme Court could not discover a particle of evidence tending to show defendant's negligence in the construction of the chute.

See, also, former appeal in the Allen case, 57 Iowa, 623.

In *KEARNS v. CHICAGO, MILWAUKEE & ST. PAUL R'Y Co.*, 66 Iowa, 599 (June Term, 1885), brakeman engaged in uncoupling cars struck and injured by a post near a side track, judgment for plaintiff in the Dallas Circuit Court was *affirmed*. "The plaintiff, while in the employment of defendant, and in the discharge of his duty as a brakeman upon a freight train, was required to assist in moving cars at a way station. The cars to be moved were on a side track passing along the platform of the station house, which was situated between the main track and this side track. It was necessary for the plaintiff to accompany the cars intended to be moved. He rode upon one of the cars past the platform, and was required to descend by the ladder for the purpose of uncoupling the cars or some of them, and while in this act he was struck by a post fixed in the platform about twenty inches from the car, and thereby sustained the injury of which he complains. The post, with others, had been erected by the station agent for the purpose of supporting a clothes line used by his family living in a part of the station house. The posts were in no way connected with the use of the railroad." \* \* \* Railroad liable for permitting such an obstruction, and adding to the perils of railroad employees.

10. MINOR EMPLOYEES.

In *HENRY (by next friend) v. SIOUX CITY & PACIFIC R'Y Co.*, 66 Iowa, 52 (April Term, 1885), brakeman injured while coupling cars, judgment for plaintiff in the Cherokee District Court was *reversed* for admission of

irrelevant evidence, etc. It appeared that when the train on which plaintiff was acting as brakeman arrived at a certain station, orders were received to leave two empty stock cars at that station. Some switching was necessary to set out the stock cars and put them in the proper position on the side track. Some cars were already standing on the side track, and they were moved. When the cars had been properly shifted on the tracks there were five cars attached to the engine, which were "kicked" or thrown back upon the side track. After they were thrown off by the engine, and while they were in motion, the plaintiff climbed upon the last car of the five and ran along the top of the cars, and descended the ladder by the forward car, and alighted upon the ground when it was within a car and a half or two car lengths from the car standing on the side track, and ran forward and made the coupling. The cars came together with such force that plaintiff was thrown down, and one of his ankles was seriously injured by one of the car wheels.

See subsequent decisions in the HENRY case, 70 Iowa, 233, and 75 Iowa, 84; in the latter case judgment for plaintiff for \$8,000 was affirmed.

In GIBBONS v. CHICAGO, BURLINGTON & QUINCY R'Y Co., 66 Iowa, 231 (June Term, 1885), brakeman injured, judgment for plaintiff in the Wapello Circuit Court was reversed on the ground of contributory negligence. "At the time plaintiff received the injury complained of he was between 20 and 21 years of age, and had been in the employ of defendant, as brakeman, for some twelve or fifteen days. He had no previous experience as a brakeman. He received his injury, as he testified upon the trial, by falling upon the railway track while running in front of a moving engine and train to turn a switch to sidetrack the train. He claims that he undertook to perform this duty by getting upon the engine, going along the running board, and down on the pilot or cow-catcher, and stepping from the front of it on the track and running ahead of the engine on the track towards the switch. He testified that he alighted upon the track in safety, and as he ran in front of the engine he fell, and was unable to get outside of the rails in time to avoid injury. He further claims that after he stepped upon the track he made such speed in running that when he fell he was about fifteen feet in advance of the engine."

In YOULL (by next friend) v. SIOUX CITY & PACIFIC R'Y Co., 66 Iowa, 346 (June Term, 1885), minor employee, about 18 years of age, acting as brakeman on defendant's freight train, injured by being thrown from car by sudden jerk of train which was making a "flying switch," judgment on verdict directed for defendant in the Cherokee Circuit Court was affirmed, it being held, among other rulings, that plaintiff assumed the risk.

In GORMAN v. MINNEAPOLIS & ST. LOUIS R'Y CO., 78 Iowa, 509 (October Term, 1889), plaintiff's intestate, a brakeman in defendant's employ, about 20 years old, killed while attempting to uncouple a locomotive under the conductor's orders, judgment for plaintiff in the Kossuth District Court for \$5,630.63 was reversed, on the ground that there was not sufficient evidence of defendant's negligence to support the verdict.

In the GORMAN case it was held that "Johnson's New Universal Encyclopædia" was competent evidence to prove expectancy of life, a witness's "impression" being that it was a standard and scientific work.

**FOX v. CHICAGO, ST. PAUL & KANSAS CITY R'Y CO.**, 86 Iowa, 368 (October, 1892); minor employee, acting as brakeman by authority of conductor, injured in mounting a moving box car for purpose of setting brake, slipping and his foot and toes crushed by the car wheel; judgment for plaintiff in the Franklin District Court for \$3,500 *affirmed*.

**KROENER v. CHICAGO, MILWAUKEE & ST. PAUL R'Y CO.**, 88 Iowa, 16 (May, 1893); brakeman coupling cars run over by train, his foot becoming lodged between a guard rail and a lead rail at the switch; defective appliances; judgment for plaintiff in the Tama District Court for \$12,000 was *reversed* unless plaintiff filed a remittitur of the judgment for damage in excess of \$8,000; verdict excessive where plaintiff lost a foot, was 20 years of age at time of injury, earning sixty dollars per month, and had life expectancy of forty-two years.

**HORAN (by next friend) v. CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA R'Y CO.**, 89 Iowa, 328 (October, 1893); brakeman coupling flat car to engine injured by his right hand being caught and crushed between the drawbars, thumb and forefinger having to be amputated; judgment for plaintiff in the Woodbury District Court for \$4,000 *affirmed*.

In **YEAGER (by next friend) v. BURLINGTON, CEDAR RAPIDS & NORTHERN R'Y CO.**, 93 Iowa, 1 (December, 1894), it was held (as per syllabus to report) that "a railroad company is not bound to instruct one who begins his first work as brakeman with it, how to mount moving cars or to point out the dangers incident to such mounting, when he knew by observation the manner of mounting and dangers attending it." Plaintiff, who was a little over 19 years of age, in attending to his first duty as a brakeman on defendant's freight train, was injured in trying to mount the moving car, his foot slipping off the oil box, causing him to fall, and his foot was run over and crushed. Judgment on verdict directed for defendant in the Cedar Rapids Superior Court was *affirmed*.

## II. BRAKEMEN INJURED — MISCELLANEOUS.

**BRADY, ADM'R v. BURLINGTON, CEDAR RAPIDS & NORTHERN R'Y CO.**, 72 Iowa, 53 (June Term, 1887); brakeman killed by freight train colliding with detached cars; judgment for plaintiff in the Buchanan District Court for \$10,000 *reversed*; erroneous instruction that certain evidence showed negligence on part of conductor of train.

**MILLER v. ILLINOIS CENTRAL R'Y CO.**, 89 Iowa, 567 (January Term, 1894); brakeman injured by stepping upon a defective lid to the manhole of the water tank on the tender of an engine while passing from the cab to the engine to set brakes; judgment for plaintiff in the Dubuque District Court *reversed*; erroneous admission of certain evidence.

In **KOONTZ v. CHICAGO, ROCK ISLAND & PACIFIC R'Y CO.**, 65 Iowa, 224 (December Term, 1884), brakeman getting off train to see what was matter with train, falling through bridge and killed, judgment on verdict directed for defendant in the Johnson Circuit Court was *affirmed*, the accident being one of the risks of the service.

In **STEELE v. CENTRAL RAILROAD OF IOWA**, 43 Iowa, 109 (June Term, 1876), brakeman, while switching, struck by train, run over and one of his arms crushed, judgment for plaintiff for \$4,000 in the Mahaska District

Court was *affirmed*. Plaintiff attempted to pick a coupling pin from the track as the train was slowly backing, having signaled the fireman to stop, but the latter failed to obey the signal.

## 2. Coupling and uncoupling cars.

### a. Employees coupling cars.

In *BALDWIN v. CHICAGO, ROCK ISLAND & PACIFIC R'y Co.*, 50 Iowa, 680 (June Term, 1879), employee injured while coupling cars, defective appliances being alleged, judgment for plaintiff in the Cass Circuit Court was *reversed* for erroneous instructions; assumption of risk.

*HAUGH, ADM'R v. CHICAGO, ROCK ISLAND & PACIFIC R'y Co.*, 73 Iowa, 66 (October Term, 1887); employee, attempting to couple car loaded with lumber to defendant's train, killed by being caught between projecting lumber and the tender; judgment for plaintiff in the Scott District Court *affirmed*.

*WHALEN v. CHICAGO, ROCK ISLAND & PACIFIC R'y Co.*, 75 Iowa, 563 (October Term, 1888); employee coupling cars injured by negligence of "wiper" in temporary charge of engine; plaintiff's hand crushed; judgment for plaintiff in the Louisa District Court for \$2,300 *affirmed*.

In *CALKINS v. CHICAGO, MILWAUKEE & ST. PAUL R'y Co.*, 92 Iowa, 714 (October, 1894), judgment for the railway company in the Linn District Court was *affirmed*. Plaintiff was coupling a freight car to the tender of a locomotive at the time of the accident, and in consequence of alleged negligence of the engineer the engine and tender were backed with such force that plaintiff's hand was caught and three of the fingers of his right hand were mashed. It was held that a verdict was properly directed for defendant where the allegation of engineer's negligence was supported solely by plaintiff's testimony that he could not tell whether the engineer, from the time he (plaintiff) took hold of the link until the accident happened, applied the air brake or let it off.

*KERNS v. CHICAGO, MILWAUKEE & ST. PAUL R'y Co.*, 94 Iowa, 121 (April, 1895); employee injured while attempting to couple the pilot bar of a locomotive road engine to a box car furnished with a Janney coupler and drawbar; negligent act of engineer in increasing speed of train; plaintiff's hand injured; judgment for plaintiff in the Dallas District Court *affirmed*.

### b. Switchmen injured — Coupling cars.

*MCKEAN v. BURLINGTON, CEDAR RAPIDS & NORTHERN R'y Co.*, 55 Iowa, 192 (December Term, 1880); switchman stepping on ladder on side of freight car in motion, and stooping over to seize an appliance for the purpose of changing a switch, thrown from car by sudden checking of speed of car without signal, run over and foot injured; judgment for plaintiff in the Linn District Court for \$4,000 *affirmed*.

*SMITH v. CHICAGO, ROCK ISLAND & PACIFIC R'y Co.*, 99 Iowa, 617 (October, 1896); switchman stepping between standing car and cars that were being slowly backed, making a coupling, and in starting to go out from between the cars, from some cause fell or was thrown, and one of his legs was run over; not sufficient evidence of negligence on defendant's part;

judgment on verdict directed for defendant in the Polk District Court *affirmed*.

**FORD, ADM'X v. CHICAGO, ROCK ISLAND & PACIFIC R'Y CO.**, 91 Iowa, 179 (May, 1894); yard switchman and brakeman, while uncoupling cars, stepping between the ties of a cattle guard and killed by cars running over him; judgment for plaintiff in the Cedar District Court *reversed*; erroneous admission of certain evidence.

**O'CONNER v. ILLINOIS CENTRAL R'Y CO.**, 83 Iowa, 105 (May, 1891); employee engaged in switching cars injured by a freight car being derailed on a curve of the track, and plaintiff thrown therefrom; defective track alleged; judgment for plaintiff in the Woodbury District Court *reversed*; verdict not supported by evidence.

**PIEART, ADM'R v. CHICAGO, ROCK ISLAND & PACIFIC R'Y CO.**, 82 Iowa, 148 (January, 1891); switchman fatally injured by an engine passing over him while in the act of detaching a car from the engine in motion; judgment for plaintiff in the Cass District Court *reversed* for insufficient instructions on contributory negligence, etc.

In **VARY v. BURLINGTON, CEDAR RAPIDS & MINNESOTA R'Y CO.**, 42 Iowa, 246 (December Term, 1875), it was held that "a person may be the general servant of one, and at the same time the special servant of another, in respect of some particular service;" and that one in such joint service may elect to sue either or both employers. The rule was applied in the **VARY** case, the syllabus to the official report stating the case as follows: "Vary was in the general employment of the Chicago & N. W. R'y Co., his duty being to attend to the switches and couple and uncouple its cars and those of defendant at a station where they used a common track. His wages were paid by both companies, although he received them from the former. He was injured while coupling the cars of defendant: Held, that he was at the time defendant's servant, and could maintain an action against it for injuries caused by its negligence." Judgment on demurrer to complaint *reversed*.

#### c. Employees coupling cars — Miscellaneous.

**GRANNIS v. CHICAGO, ST. PAUL & KANSAS CITY R'Y CO.**, 81 Iowa, 444 (October, 1890); plaintiff employed as a "wiper" in defendant's round-house, to clean engines, etc., injured while attempting to couple an engine to a car, his right hand and arm being caught between tender and car; defective appliance; judgment for plaintiff in the Chickasaw District Court for \$5,000 *affirmed*.

**BUTLER, ADM'X v. CHICAGO, BURLINGTON & QUINCY R'Y CO.**, 87 Iowa, 206 (January, 1893); "clinker man," while aiding in shifting engine tanks, killed as he was in the act of coupling two locomotive tanks together, being under the tanks for the purpose, the engine being moved; judgment for plaintiff in the Union District Court *affirmed*.

#### 8. Conductors injured.

In **DEWEY, ADM'R v. CHICAGO & NORTHWESTERN R'Y CO.**, 31 Iowa, 373 (June Term, 1871), conductor of freight train, riding on engine, killed by derailment of train which collided with horses on track, judgment for plain-

tiff in the Iowa Circuit Court for \$5,000 was *reversed*, the deceased being the superior officer of the train and directing its movements at the time of the casualty, his administrator could not recover on the ground of negligence of employees.

In *LANE, ADM'R v. CENTRAL IOWA R'Y CO.*, 69 Iowa, 443 (October Term, 1886), conductor on construction train attempting to escape from top of box car by way of ladder, jumping to ground and caught in the wreck of the train, which was derailed in a collision with a cow on track, and instantly killed, judgment for defendant in the Monroe District Court was *affirmed*, on the ground of contributory negligence.

In *McMARSHALL v. CHICAGO, ROCK ISLAND & PACIFIC R'Y CO.*, 80 Iowa, 757 (June, 1890), conductor in employ of another railroad company struck and killed by a switch engine of defendant while he was on defendant's track for the purpose of giving or receiving signals from the person in charge of his own train, judgment for plaintiff in the Lee District Court for \$2,500 was *affirmed*.

*HARKER v. BURLINGTON, CEDAR RAPIDS & NORTHERN R'Y CO.*, 88 Iowa, 409 (May, 1893); conductor on freight train attending to brakes, under orders of superior requiring hasty action, coming in contact with an awning over a station platform and sustaining probable permanent injuries; exceptions to rule of assumption of risk; judgment for plaintiff in the Dickinson District Court for \$7,660 *affirmed*; verdict not excessive where injuries were severe, likely to be permanent, confined to bed for a week, unable to work for three months, very little work for nine months, unable again to act as freight conductor, 30 years of age at time of injury, earning sixty-five dollars a month, and with life expectancy of thirty-four years.

#### 4. Laborers injured.

##### a. Loading and unloading.

In *SIMONSON v. CHICAGO, ROCK ISLAND & PACIFIC R'Y CO.*, 49 Iowa, 87 (June Term, 1878), plaintiff's intestate, a railroad employee, injured while loading one of defendant's cars, judgment for plaintiff in the Shelby Circuit Court was *affirmed*.

In *RASMUSSEN, ADM'R v. CHICAGO, ROCK ISLAND & PACIFIC R'Y CO.*, 65 Iowa, 236 (December Term, 1884), plaintiff's intestate, a shoveler in defendant's employ, engaged in loading and unloading a gravel or dirt train, killed by the sudden falling of earth from a bank where he was at work, judgment for defendant in the Pottawattamie Circuit Court was *affirmed*, the deceased having knowledge of the danger and assuming the risks thereof.

*HANDELUN v. BURLINGTON, CEDAR RAPIDS & NORTHERN R'Y CO.*, 72 Iowa, 709 (March, 1887); laborer engaged in loading and unloading gravel cars run over by train, a quantity of sand having fallen upon him in a narrow space into which he had stepped to avoid being struck by train, the sand forcing him against the train; judgment for plaintiff in the Linn District Court *reversed*, it being held that plaintiff had not made out a case.

##### b. Struck by cars.

In *CROWLEY v. BURLINGTON, CEDAR RAPIDS & NORTHERN R'Y CO.*, 65

Iowa, 658 (April Term, 1885), laborer cleaning snow and ice from the tracks and switches in defendant's yards struck by one of defendant's cars and his arm injured, judgment for plaintiff in the Benton District Court was affirmed.

In KEEFE, ADM'X v. CHICAGO & NORTHWESTERN R'Y CO., 92 Iowa, 182 (October, 1894), judgment for plaintiff in the Clinton District Court was reversed for an erroneous instruction, it being held that "to hold the defendant liable for the failure of its employees to use due care to ascertain the danger which Keefe was in, without regard to his negligence, is to make the defendant absolutely liable for its failure to exercise due care, and to ignore the doctrine of contributory negligence." It appeared that plaintiff's intestate, Keefe, was working with a shovel on one of defendant's tracks in its railroad yard at the time of the accident (and had worked there and in the vicinity for many years), when he was struck by the tender of a locomotive, run over and killed. The Supreme Court held that the evidence would have justified a finding of contributory negligence, and, therefore, it was error to give the foregoing instruction.

c. Walking on track.

In VREELAND, ADM'X v. CHICAGO, MILWAUKEE & ST. PAUL R'Y CO., 92 Iowa, 279 (October, 1894), employee, while walking along railroad track, carrying an article on his back, struck by one of defendant's engines and fatally injured, judgment for plaintiff for \$2,500 in the Scott District Court was reversed. The syllabus to the official report thus states the case:

"An employee who knows when a train is to pass, walks ahead of it and disregards a warning to get off because he thinks he is on the track of another parallel road, is negligent.

"There is no obligation to stop a train till it becomes reasonably apparent that a man on the track will not get off and is in danger.

"Deceased is first seen sixty feet in front of a train with a grain door on his back, train is going without steam, headlight burning and bell ringing, at three miles an hour. When it got within twenty-five feet of him fireman informed engineer. The latter was then unable to stop his train. Held, that the fireman was not negligent."

d. Laborers injured — Miscellaneous.

CHASE v. BURLINGTON, CEDAR RAPIDS & NORTHERN R'Y CO., 76 Iowa, 675 (September, 1888); "car-catcher" in defendant's employ injured while climbing upon a car belonging to another company; collision of his car with another on same track; judgment for plaintiff in the Poweshiek District Court for \$12,500 was reversed for erroneous admission of evidence relating to chances of promotion as bearing on question of damages.

In MANNING v. BURLINGTON, CEDAR RAPIDS & NORTHERN R'Y CO., 64 Iowa, 240 (July, 1884), it appeared that plaintiff was an employee of defendant, his occupation being that of a sweeper in its roundhouse, and was injured by falling into a hole which he claimed had been negligently and carelessly left uncovered by defendant's other employees. Judgment for the railway company in the Linn District Court was affirmed.

In DOGGETT, ADM'R v. ILLINOIS CENTRAL R. R. CO., 34 Iowa, 284 (June

Term, 1872), judgment for plaintiff in the Buchanan District Court was *reversed*, the case being stated in the syllabus to the official report, as follows: "Plaintiff's decedent being in the employ of a railroad company, but not engaged in operating the train in question, and on which he was riding, voluntarily got upon the tender of the engine to ride. While he was in this position the engine broke through a defective culvert or bridge, and he was killed. A 'caboose' car was attached to the train for passengers and those not engaged in operating the train, to ride in, and it appeared that if the deceased had been in there he would not have been injured. *Held*, that he was guilty of contributory negligence, and that plaintiff could not recover."

#### 5. Machinists injured.

In *KITTERINGHAM v. SIOUX CITY & PACIFIC R'y Co.*, 62 Iowa, 285 (December Term, 1883), employee, a helper in defendant's machine shops, removing old brasses from the boxing of car wheels and axles covered with grease, poisoned by the handling of the brasses, resulting in the loss of a finger, judgment for defendant in the Woodbury District Court was *affirmed*. Where the evidence tended to show that the injury was the result of an ordinary cut, and not of defendant's negligence, it was proper to charge that plaintiff could not recover if the jury found that the injury was occasioned by impurity of his blood.

*PIERCE v. CENTRAL IOWA R'y Co.*, 73 Iowa, 140 (October Term, 1887); mechanic in defendant's shops directed to assist other employees in removing some screens from passenger cars, standing on ladder placed against cars for the purpose, injured by sudden backward movement of the train, which caused the ladder to fall; judgment for plaintiff in the Marshall District Court *affirmed*.

*TRCKA v. BURLINGTON, CEDAR RAPIDS & NORTHERN R'y CO.*, 100 Iowa, 205 (December, 1896); machinist in defendant's shops injured by the fall of a plank from scaffolding used by another machinist in placing shafting in the room where plaintiff was working; judgment on verdict directed for defendant in the Cedar Rapids Superior Court *affirmed*; fellow-servant rule.

#### 6. Miscellaneous.

In *MCCARTHY v. CHICAGO, ROCK ISLAND & PACIFIC R'y Co.*, 83 Iowa, 485 (October, 1891), bridge builder in employ of defendant engaged in assisting in removal of heavy timber, known as a chord, from a truss bridge to the ground by the aid of a pile driver and flat car, struck by the chord and leg injured, judgment for plaintiff in the Cass District Court was *reversed*, the special findings not being supported by the evidence.

In *DOYLE v. CHICAGO, ST. PAUL & KANSAS CITY R'y Co.*, 77 Iowa, 607 (May Term, 1889), employee engaged in repairing bridge struck by a coupling pin hurled by the wheel of a car from a passing train, judgment for plaintiff in the Marshall District Court was *affirmed*. It appeared that "plaintiff, with others employed in repairing one of defendant's bridges, withdrew a short distance to allow a passenger train, running at the rate of about thirty miles an hour, to pass. As it passed, an old, rusty and bent coupling pin was hurled by a wheel of a car, striking plaintiff on the head.

and causing the injury complained of. The evidence showed that the pin was not on the bridge, and justified the jury in concluding that it was lying loose upon a platform of one of the cars. The pin had a hole in the head for a chain, and was such as was used upon cars having Miller's platform, which was on the cars in the train causing the accident; but the pin was not chained to the platform. Held, that to allow it to lie loose upon the platform was negligence, because it was liable to fall and become an obstruction on the track, and that defendant was liable for such negligence in this case, even though the precise accident and injury which occurred could not have been foreseen and expected from the falling of the pin from the platform."

#### 7. Object near track.

In *MARTENSEN v. CHICAGO, ROCK ISLAND & PACIFIC R'y Co.*, 60 Iowa, 705 (April Term, 1883), it appeared that plaintiff was a laborer in defendant's employ, working in a stock car, spreading sand which had been thrown in the car. While he was in the car, thus employed, it was attached to an engine and put in motion to be taken to the stock yards. While it was in motion the plaintiff climbed out of the car, and stood upon what is called the oil box, which is a kind of covering for the end of an axle of a car, and maintained himself by holding on to the slat above. While in this position the train moved along to a switch, and was reversed, and it ran backward upon another track. While moving upon this last track the train passed a freight platform, and plaintiff was struck by some "running boards" which projected beyond the edge of the platform, and was thrown under the wheels and injured. These running boards are movable, and are used to bridge over the space between the cars and the platform in order to load and unload freight. The plaintiff claimed that he was injured by the negligence of the defendant in permitting the "running boards" to remain projecting beyond the platform, and also by the negligent operation of said train. Judgment for defendant in the Pottawattamie Circuit Court was *affirmed*, plaintiff having needlessly placed himself in a dangerous position on the car.

In *HAGGERTY, ADM'x v. CHICAGO, ST. PAUL & KANSAS CITY R'y Co.*, 90 Iowa, 405 (January, 1894), judgment for plaintiff in the Dubuque District Court was *reversed* on the ground of contributory negligence. Hugh C. Haggerty was in the employ of the defendant as car accountant at Dubuque on September 30, 1887. On the evening of that day he was killed while riding on the ladder on the side of a box freight car. The evidence tended to show that he came to his death by contact with a switch stand at the side of and near the railroad track. The syllabus to the official report states the case as follows: "One whose duty it was to take car numbers came down the side ladder of a car soon to stop, but in motion, to the bottom of the ladder, and while hanging there to alight when the car stopped, was killed by coming in contact with a switch which could not have struck him had he been higher up. Held, that there was contributory negligence." On the question of contributory negligence the Supreme Court referred to the case of *McKee v. R'y Co.*, 83 Iowa, 616, for a full discussion and reference to authorities.

**8. Section hands, etc., injured.***a. Construction trains, flat cars, etc.*

In *NELSON v. CHICAGO, ROCK ISLAND & PACIFIC R. R. Co.*, 38 Iowa, 564 (June Term, 1874), minor employee, 18 years old, engaged in taking up track, loading ties, etc., on flat cars, thrown from flat car, which was suddenly started without signal, and leg injured, judgment for plaintiff in the Cass Circuit Court for \$7,375 was *reversed* for erroneous instruction which excluded the rule of burden of proof upon plaintiff to show that he was injured without want of reasonable care on his part.

In *JEFFREY v. KEOKUK & DES MOINES R. R. Co.*, 51 Iowa, 439 (June Term, 1879), employee riding on flat car of construction train falling off car and run over, caused by sudden movement of the train without warning, judgment for plaintiff in the Van Buren Circuit Court for \$6,500 was *reversed* for error in permitting a rule of the defendant company prohibiting "running switches" to be introduced, the evidence not showing that the injury was caused in attempting to make a running switch. A special finding manifestly against the evidence is an indication of passion and prejudice on the part of the jury.

In *GEORGE v. KEOKUK & DES MOINES R. R. Co.*, 53 Iowa, 503 (June Term, 1880), an action arising out of the same accident as that in *Jeffrey v. K. & D. M. R. Co.*, 51 Iowa, 439 (preceding paragraph), judgment for plaintiff was *reversed* on similar grounds as in the *Jeffrey* case.

A subsequent trial in the *JEFFREY* case resulted in verdict and judgment for plaintiff for \$5,500, was *affirmed*. Injuries sustained, leg broken, requiring amputation. See 56 Iowa, 546 (December Term, 1881).

In *MILLER v. MINNESOTA & NORTHWESTERN R'Y CO.*, 76 Iowa, 655 (September, 1888), the syllabus to the official report states the case as follows: "A contractor agreed to lay defendant's track at the rate of a certain number of miles per month, defendant "to furnish all motive power and cars, and operate the construction trains." One of the contractor's employees was killed, as alleged, by the too rapid running of a construction train. Held, that defendant was not liable, because, from the nature and terms of the contract, it did not have control of the construction trains, though the train men were retained on its pay-roll and received their wages from it."

*b. Hand-car accidents.*

In *HOBEN v. BURLINGTON & MISSOURI RIVER R. R. CO.*, 20 Iowa, 563 (June Term, 1866), track hand returning from work on a hand car injured by car being thrown from track in collision with a train, judgment for plaintiff in the Henry District Court for \$400 was *reversed* for errors in giving and refusing instructions.

In *CAMPBELL v. CHICAGO, ROCK ISLAND & PACIFIC R. R. CO.*, 45 Iowa, 76 (December Term, 1876), the facts are stated as follows: "The plaintiff's intestate, her husband, Michael Campbell, was in the employ of the defendant as a section hand on its railroad, and while so in its employ was fatally injured by being run over by a hand car. The accident occurred in the following manner: The hand car was moving eastward under the direction of the section boss; the deceased and three or four others were riding on

it for the purpose of inspecting the road; the passenger train from the east was past due; the approach of the passenger train was discovered when about forty or fifty rods distant; the brake was applied to the hand car to stop it; the deceased stepped or was thrown off in front of the hand car and was run over by it, and received injuries of which he died. The plaintiff claims the right to recover on the ground that the section boss was negligent in running said car." Judgment for plaintiff in the Guthrie District Court was *reversed* for erroneous instruction that it was negligent to run the hand car under the circumstances stated. The court (per ADAMS, J.) said: "It is sufficient to say, in this case, that the safety of the section hands was not of such paramount importance as to make it necessarily negligence in the section boss to take them upon the road in the hand car when a train was past due, although more than ordinary danger was incurred thereby. Frandsen *v.* Chicago, R. I. & P. R. R. Co., 36 Iowa, 372." \* \* \*

In *HURST v. CHICAGO, ROCK ISLAND & PACIFIC R'y Co.*, 49 Iowa, 76 (June Term, 1878), section hand running a hand car injured by being thrown from car and run over and leg broken, judgment for plaintiff for \$4,000 in the Madison District Court was *reversed* for erroneous instruction as to liability of railroad company to employee injured in performing orders of section boss.

In *FARLEY v. CHICAGO, ROCK ISLAND & PACIFIC R'y Co.*, 56 Iowa, 337 (June Term, 1881), section hand run over and killed by cars becoming detached from train, judgment for plaintiff in the Polk District Court was *affirmed*.

*HAWLEY v. CHICAGO, BURLINGTON & QUINCY R'y Co.*, 71 Iowa, 717 (October, 1886); plaintiff's assignor, operating hand car on defendant's road, injured in collision with engine; judgment for plaintiff in the Polk Circuit Court *affirmed*.

In *LARSON v. ILLINOIS CENTRAL R'y Co.*, 91 Iowa, 81 (May, 1894), it was held that "a railway is liable for injuries sustained by a section hand while operating a hand car which collides with another through the negligence of the section foreman," and judgment for plaintiff in the Webster District Court was *affirmed*.

*HAMILTON v. CHICAGO, ROCK ISLAND & PACIFIC R'y Co.*, 93 Iowa, 46 (October, 1894); section hand putting his mittens in supply box on hand car injured by starting of car without orders from foreman; fellow-employees unaware of plaintiff's peril; judgment for defendant in the Appanoose District Court *affirmed*.

*c. Injured on track.*

*BAKER, ADM'R v. CHICAGO, ROCK ISLAND & PACIFIC R'y Co.*, 95 Iowa, 163 (May, 1895); section hand walking on track, after day's work, struck and killed by construction train; judgment for plaintiff in the Davis District Court *reversed*; trespasser; contributory negligence.

*NELLING, ADM'X v. CHICAGO, ST. PAUL & KANSAS CITY R'y Co.*, 98 Iowa, 554 (May, 1896); section hand returning from work on hand car killed by freight train; other employees jumping off to avoid collision, but deceased stopped to remove car from track and was killed; judgment on verdict

directed for defendant in the Black Hawk District Court *affirmed*; contributory negligence.

*d. Miscellaneous.*

**FARMER v. CENTRAL IOWA R'Y CO.**, 67 Iowa, 136 (October Term, 1885); section hand engaged in cleaning snow from track, riding on hand car to another part of road, injured by feet being frozen; exposure to elements; contributory negligence; judgment for plaintiff in the Keokuk District Court *reversed*.

**RAYBURN v. CENTRAL IOWA R'Y CO.**, 74 Iowa, 637 (May Term, 1888); section hand engaged in removing ice and snow from track, directed by conductor of a passing train of freight cars to get on board to assist in unloading cars at another place, injured by being thrown down by sudden jerk of train as he was trying to board same; judgment for plaintiff in the Mahaska District Court for \$3,500 (permanent injury to one of his knees) was *affirmed* and petition for rehearing overruled.

**LIGHT v. CHICAGO, MILWAUKEE & ST. PAUL R'Y CO.**, 93 Iowa, 83 (October, 1894); section hand ordered by section foreman to get upon coal car injured while in the act of getting on the car, owing to sudden start of engine, whereby his foot slipped and was crushed between drawbar and deadwood; judgment for plaintiff in the Dallas District Court *affirmed*.

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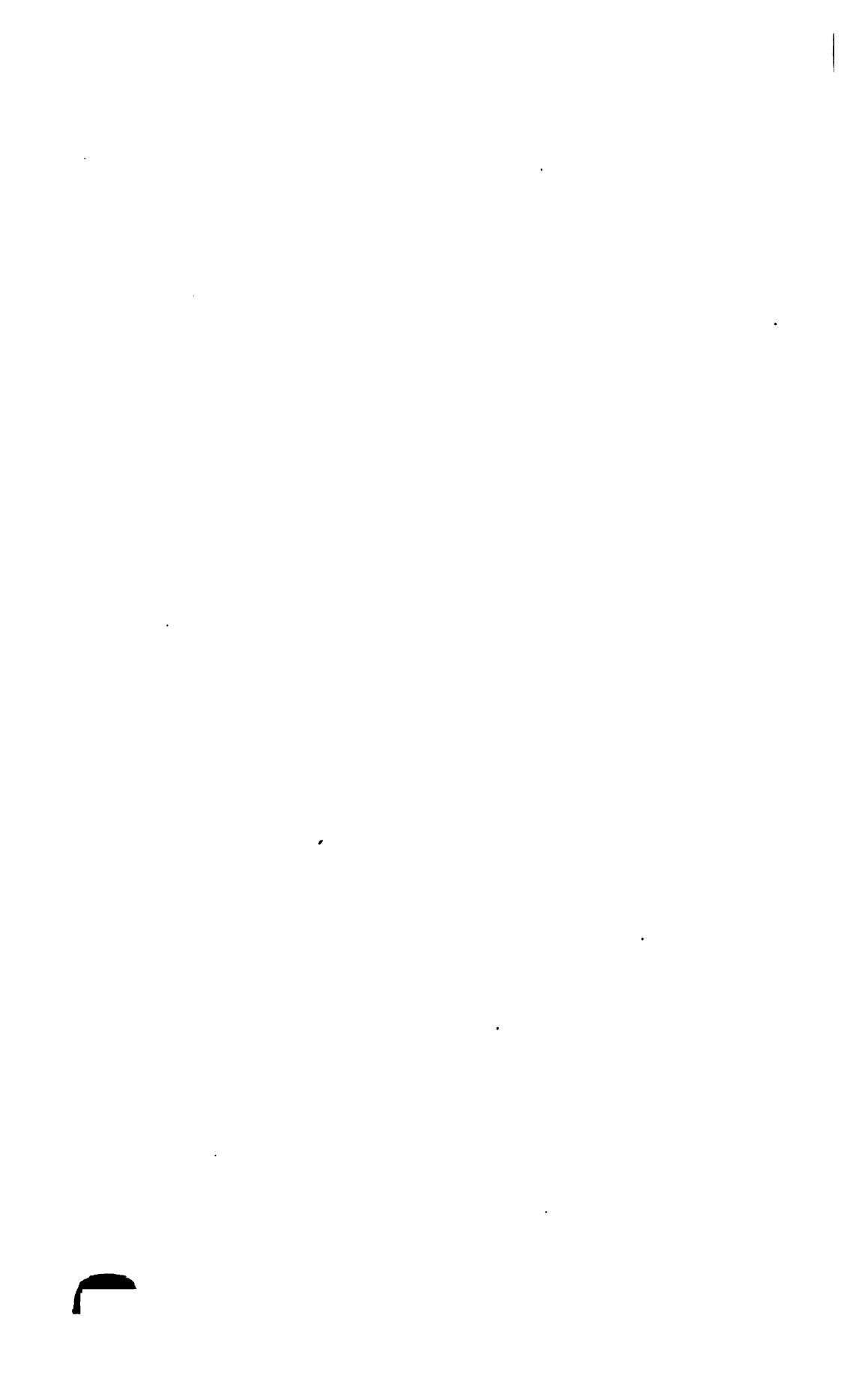
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